TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 83

HATTIEBELLE O. SIMONSON, TRUSTEE IN BANKRUPTCY, ETC., ET AL., PETITIONERS,

vs.

R. C. GRANQUIST, DISTRICT DIRECTOR OF INTERNAL REVENUE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 22, 1961
CERTIORARI GRANTED JUNE 5, 1961

No. 16073

United States
Court of Appeals
for the Ninth Circuit

HATTIEBELLE O. SIMONSON, Trustee in Bankruptcy of the Estate of Max L. Druxman, Bankrupt,

Appellant,

vs.

R. C. GRANQUIST, District Director of the Internal Revenue Service,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Oregon.

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—6-10-60

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

ASHER & CRAMER and
FRED A. GRANATA,
603 Corbett Bldg.,
Portland, Oregon,

For Appellant.

CHARLES K. RICE,
Assistant U. S. Attorney General;

LEE A. JACKSON,
Attorney, Tax Division, Dept. of Justice,
Washington 25, D. C.;

C. E. LUCKEY,
United States Attorney,
Portland, Oregon,

For the Appellee.

Form 2317 (March 1957)

U. S. Treasury Department
Internal Revenue Service

Proof of Claim for Internal Revenue Taxes

In the United States District Court
for the District of Oregon

Docket No. B-41801

In the Matter of

MAX L. DRUXMAN dba Druxman's Jewelers,
2805 N.E. 33rd Avenue, Portland, Oregon.

Type of Proceeding: Liquidating Bankruptcy

CLAIM OF THE UNITED STATES FOR INTERNAL REVENUE TAXES

The undersigned officer of the Internal Revenue Service, a duly authorized agent of the United States in this behalf, being duly sworn, deposes and says that:

1. Max L. Druxman is justly and truly indebted to the United States in the sum of $5,821.69 with interest thereon as hereinafter stated;

2. The said debt is for taxes due under the internal revenue laws of the United States as follows:

Kind of Tax and Period	Amount Due	Remarks Tax Lien Filed	Date Tax Lien Arose
Income Tax—1949	$285.00*	10/31/57	9/6/57
Penalty	128.27		
Interest to 11/29/57			
Income Tax—1950	299.00*	10/31/57	9/6/57
Penalty	134.61		
Interest to 11/29/57	120.28		
Income Tax—1951	554.00*	10/31/57	9/6/57
Penalty	237.17		
Interest to 11/29/57	189.63		
Income Tax—1952	595.00*	10/31/57	9/6/57
Penalty	255.60		
Interest to 11/29/57	167.97		
Income Tax—1953	595.00*	10/31/57	9/6/57
Penalty	255.60		
Interest to 11/29/57	132.27		
Income Tax—1954	572.00*	10/31/57	9/6/57
Penalty	241.20		
Interest to 11/29/57	89.97		
Income Tax—1955	590.00*	10/31/57	9/6/57
Penalty	189.96		
Interest to 11/29/57	57.40		

*Plus interest on this amount at 6% per annum from 11/29/57 to the date of payment.

3. No part of said debt has been paid and the same is now due and payable at the Office of the District Director of Internal Revenue;

4. There are no set-offs or counterclaims to said debt;

5. Except for the statutory tax liens which arose on the dates above stated; the United States does not hold, to the deponent's knowledge or belief, any security or securities for said debt;

6. No note or other negotiable instrument has been received for said debt or any part thereof, nor has any judgment been rendered with respect to said debt; and

7. Said debt has priority and must be paid in full in advance of distribution to creditors as and to the extent provided by law:

In Bankruptcy Act Proceedings see Sections 64, 77e, 199, 337(2), 455, and 659 of the Bankruptcy Act (11 U.S.C. 104, 205(e), 599, 737(2), 855, and 1059),

In Other Proceedings see Section 3466 of the Revised Statutes (31 U.S.C. 191). Also, attention is invited to Section 3467 (31 U.S.C. 192) with respect to the personal liability of any executor, administrator, or other person who fails to pay the claims of the United States in accordance with their priority.

/s/ W. E. PUTNAM,

Chief, Special Procedures Section, Office of the District Director of Internal Revenue, 827 N.E. Oregon Street, Portland 14, Oregon.

Subscribed and Sworn to before me this 29th day of November, 1957.

[Seal] /s/ DORIS BARNES,
Notary Public.

My commission expires April 30, 1958.

[Endorsed]: Filed December 3, 1957, Referee.

[Endorsed]: Filed October 9, 1959, U.S.D.C.

United States District Court
For the District of Oregon

In Bankruptcy—No. B-41801

In the Matter of

MAX L. DRUXMAN,

Bankrupt.

TRUSTEE'S OBJECTIONS TO THE CLAIM OF R. C. GRANQUIST, DISTRICT DIRECTOR OF INTERNAL REVENUE SERVICE

To: Honorable Folger Johnson, Referee in Bankruptcy of this Court.

Comes now Hattiebelle O. Simonson, Trustee of the above-entitled estate and objects to part of the claim of R. C. Granquist, District Director of Internal Revenue Service upon the following grounds:

1. That $22.13 of this alleged claim represents interest which arose subsequent to the filing of the petition in voluntary bankruptcy on file herein.

2. That $1,441.21 of this alleged claim represents penalties for non-payment of taxes.

Wherefore your Trustee prays for an order disallowing those parts of said claim as set out hereinabove.

/s/ HATTIEBELLE O. SIMONSON.

Duly verified.

[Endorsed]: Filed July 9, 1958, Referee.

[Title of District Court and Cause.]

REFEREE'S FINDINGS AND CONCLUSIONS

Statement of the Facts

The bankrupt was in the business of a small retail jeweler and the trustee was able to realize more than $8,000 upon liquidation of the business assets. This sum is sufficient to pay all tax claims and expenses of administration.

The Director of Internal Revenue has filed various claims in the bankruptcy proceeding for income, employment and excise taxes accruing prior to bankruptcy. All of these have been paid by the trustee with the exception of the penalties and post-bankruptcy interest included in claim No. 18. The trustee objected to this part of such claim and the matter has been submitted to the referee upon written briefs.

Claim No. 18 in the amount of $5,821.69 includes penalties of $1,442.41 and post-bankruptcy interest at 6% upon $4,932.41. The tax itself with interest to the date of bankruptcy was paid pursuant to order entered May 22, 1958, leaving unpaid post-bankruptcy interest in the sum of $182.49.

The taxes included in claim No. 18 were assessed against Druxman September 6, 1957, and a statement of tax due issued ten days later. Druxman filed his voluntary petition in bankruptcy on October 18, 1957. The notice of tax lien was filed by the Bureau of Internal Revenue on October 31, 1957.

The government is asserting a position as a secured creditor by virtue of its assessment lien rather than claiming as a priority creditor under Section 64 of the Bankruptcy Act.

There are three issues raised by the briefs:

1. Does the failure to file the notice of tax lien prior to bankruptcy make such lien invalid against the trustee?

2. Does Section 57(j) of the Bankruptcy Act prohibit the payment of penalties included in a claim based on a tax lien that arose prior to bankruptcy?

3. Is post-bankruptcy interest allowable to date of payment where the claim is based on a tax lien that arose prior to bankruptcy?

Conclusions of Law

Where a federal tax claim is not supported by a lien arising prior to bankruptcy, it is well settled that it is given a priority position under Section 64a (4) of the Bankruptcy Act, and that Section 57(j) prohibits the payment of penalties included in such claim. Nor is post-bankruptcy interest payable on such a claim. City of New York v. Saper, 336 U.S. 328, 93 L. ed. 710.

Where, however, a lien arose prior to bankruptcy and the tax claim is filed as a secured claim under Section 67, there is conflict and confusion in the law throughout the nation that can only be resolved by decision of the U. S. Supreme Court or by legis-

lative action on the part of Congress. Since this is a question of federal bankruptcy law rather than state law, it is to be hoped that such action will soon be forthcoming to provide uniformity in this matter throughout the federal courts. In the meantime each circuit is free to choose its own path.

Let us consider the first issue. Is a federal tax lien perfected as against the trustee of the bankrupt's estate where the tax has been assessed before bankruptcy, but the notice of the tax lien has not been filed until after the filing of the bankruptcy petition? It is admitted that a lien arises upon assessment of the tax and that such lien is valid unless the trustee fall within the group excepted by the Internal Revenue Code. 26 U.S.C.A., Section 6323(a), provides that the lien "* * * shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed * * *"

Since the trustee is neither mortgagee nor pledgee, is he a purchaser or judgment creditor under this statute? Gradual changes in the Bankruptcy Act have shown a trend to strike down secret liens and to increase the power of the trustee for the benefit of general creditors. When the Ninth Circuit, however, was confronted with the question in the case of United States v. England, 226 F. 2d 205, (1955), it chose to base its decision on the case of U. S. v. Gilbert Associates, 345 U.S. 361, 97 L. ed. 1071, 73 SCT 701, which held that the words "judgment creditor" in Section 3672 of the Internal Revenue

Code of 1954 (26 U.S.C.A., Section 6323), were used in the "usual, conventional sense of a judgment of a court of record." The Gilbert case did not involve a bankruptcy question but only the priority of a municipal tax lien over a federal where the notice of the federal lien had not been filed until after the attachment of the municipal lien which was in the nature of a judgment under state law. The England case then held that, since the Internal Revenue Code had reference only to a creditor holding a judgment obtained by judicial proceedings in the conventional sense, a trustee in bankruptcy is not a judgment creditor.

This same result was reached in a recent decision of a U. S. District Court in New Jersey. In re: Fidelity Tube Corporation, 167 F. Supp. 402 (1958).

Although a trustee in bankruptcy finds greater favor as a subsequent purchaser for value under Oregon statutes and court decisions than under the law of many other states, the trustee is still not a "purchaser" under Section 3672. In the case of U. S. v. Hawkins, 228 F. 2d 517, (9 CCA), (1955), the court said that an attaching creditor may not rely on a local Alaska statute, giving him the status of a purchaser, to claim the benefits of a favored class under Section 3672, as "purchaser" in that section usually means one who acquires title for a valuable consideration in the manner of vendor and vendee. "Taxation statutes should be construed to apply uniformly throughout the country and there is nothing to indicate that Alaskan taxpayers were

intended to get a benefit unavailable to the rest of the United States."

New York Terminal Warehouse Co. v. Bullington, 213 F. 2d 340 (5 CCA), (1954), holds that a trustee fails to qualify as a bona fide purchaser for value.

We must conclude, therefore, that the United States is entitled to claim the position of a secured creditor even though the notice of the tax lien was not filed until after the filing of the bankruptcy petition. Demand had been made upon the taxpayer and he had failed to make prompt payment.

As a lien claimant is the government entitled to demand from the bankrupt's estate not only the tax itself, but also the penalties included in the lien? The answer is to be found in the scope accorded to Section 57(j) of the Bankruptcy Act which provides:

"Debts owing to the United States or to any State or any subdivision thereof as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued on the amount of such loss according to law."

Does Section 57(j) apply only to unsecured claims or should it be interpreted to cover secured claims as well and hence to modify Section 67(b) which

provides that a statutory tax lien shall be valid against the trustee? The government has shown no pecuniary loss and it would seem more equitable to interpret Section 57(j) to prohibit the payment of penalties out of the bankruptcy estate even though such penalties are part of a tax lien arising prior to bankruptcy.

One of the two primary purposes of the bankruptcy law is to accomplish an equitable distribution of the assets among creditors. To allow penalties in addition to the taxes themselves would not achieve this result. Penalties are to prevent non-payment of taxes, acting as a deterrent to the taxpayer, but to permit their payment out of the bankruptcy estate is to penalise the innocent general creditors rather than the bankrupt. If penalties are to be paid at all, they should be paid by the bankrupt himself out of funds not belonging to his estate. It has been held, however, that although taxes are non-dischargeable, penalties and post-bankruptcy interest are not part of such taxes and would be discharged by the granting of a discharge to the bankrupt. In re: Mighell, 168 F. Supp. 811, (D. C. Kansas 1958).

Various district courts, struck with the equities of the situation, have held Section 57(j) to be controlling and have refused to allow the payment of penalties in spite of the existence of a tax lien perfected prior to bankruptcy. Among these are In re: Lykens Hosiery Mills, 141 F. Supp. 895 (DC SD NY 1956), In re: Hankey Baking Co., 125 F. Supp.

673 (DC WD Pa. 1954), In re: Burch, 89 F. Supp. 249 (D. C. Kans. 1948), In re: Parchem, 166 F. Supp. 724 (DC Minn. 1958).

Three circuit courts, however, including our Ninth Circuit, have taken the opposite position and allowed the payment of penalties, holding that Section 57(j) did not apply where the government's lien had been perfected prior to bankruptcy. In re: Knox-Powell-Stockton Company, 100 F. 2d, 979 (9 CCA 1939), Commonwealth of Kentucky, etc., v. Farmers Bank & Trust Company, 139 F. 2d, 266 (6 CCA 1943), Grimland v. U. S., 206 F. 2d 599 (10 CCA 1953).

Since we are bound by the decision of the Ninth Circuit in the absence of any action by the U. S. Supreme Court, it must be held that the government is entitled to the penalties included in claim No. 18.

Considering next the question of post-bankruptcy interest, it is the general rule that interest ordinarily ceases to run on both secured and unsecured claims, including tax claims, as of the date of the filing of the bankruptcy petition. Certain exceptions to this rule have been recognized in the case of secured claims.

In Beecher v. Leavenworth State Bank, 192 F. 2d 10 (9 CCA 1951), the court said:

"As a general rule, interest stops on both secured and unsecured claims upon the date of filing the petition in bankruptcy. Sexton v. Dreyfus, 219 U. S.

339, 31 S. Ct. 256, 55 L. Ed. 244. This is a rule of convenience which has developed from a century and a half of English bankruptcy practice. The basis of the rule is to allow orderly administration of the bankrupt's estate; matters must be brought to a halt at a time certain and this date allows the rendition of accounts without doubt as to any future claims for interest. Certain peculiar considerations require the application of the rule to interest on secured claims. Otherwise, the equity of unsecured creditors is in danger of being wiped out by interest claims of secured creditors who have extended credit at high rates during the debtor's transitional period of financial embarrassment prior to bankruptcy. Further, the period of administration may be lengthy, especially when, as here, there has been a failure to appraise the redemption value of the farm-debtor's property.

"A contrary rule for secured claims would also discourage contests by the unsecured creditors of secured claims. They would be forced to abstain so that the administration of the estate could be wound up quickly; and the trustee would have every motive to make quick sales in order to bring administration to a halt shortly.

"Two qualifications of the rule that interest on secured claims stops at the date of bankruptcy have been recognized:

"1. If the estate turns out to be fully solvent, it has been thought more equitable to apply the surplus to creditors' claims for interest rather than re-

turning the money to the debtor. Johnson v. Norris, 5 Cir., 190 F. 459, L.R.A.1915B, 884.

"2. If securities in the creditor's possession pledged as collateral yield income, this amount has been charged with the secured creditors' claims for interest. Sexton v. Dreyfus, supra.

"Except as state above, the only time in which the majority of modern cases have allowed interest after bankruptcy on secured claims is when the courts have discovered equitable reasons for doing so. Vanston, etc., Committee v. Green, 329 U.S. 156, 67 S. Ct. 237, 91 L.Ed. 162; Pacific States Corp. v. Hall, 9 Cir., 166 F. 2d 668."

Later cases added a third exception, holding that, where the security is sold for more than the sum of principal and interest due, the secured creditor is entitled to post-bankruptcy interest to the date of payment. Jefferson-Standard Life Ins. Co. v. U. S., 247 F. 2d 777 (9 CCA 1957), Palo Alto Mutual Savings and Loan Ass'n. v. Williams, 245 F. 2d 77 (9 CCA 1957), In re: Macomb Trailer Coach, 200 F. 2d 611 (6 CCA 1953).

It is claimed by the United States that it is entitled to post-bankruptcy interest as a secured creditor under this third exception, since its lien is "upon all property and rights to property, whether real or personal." 26 USCA Section 6321. It is further claimed that the lien should be treated as specific rather than general pursuant to United States v. New Britain, 347 US 81, 98 L. ed. 520, 74 S CT 367

(1954). This case, however, dealt only with liens on real property. It would seem that if this third exception is to apply to tax liens at all, it should apply only to the extent of the net value of the real property belonging to the bankrupt's estate and subject to such lien. The assets in the present case are all from the sale of personal property.

Section 67c of the Bankruptcy Act shows an intent to distinguish between liens on real and personal property as it provides that the payment of expenses of administration and wage claims shall take precedence over liens for taxes or debts owing to the United States on personal property, except as to property actually seized by the government before bankruptcy.

The cases cited by the government are not specifically in point as they deal with consensual liens held by a vendor, mortgagee or the like. The only case coming to my attention which clearly supports the government's position in regard to post-bankruptcy interest is In re: Parchem, cited supra in support of the disallowance of penalties. Two later district court cases, however, have taken the opposite position, holding that post-bankruptcy interest does not accrue on tax claims, whether liened or unliened. In re: Young, 171 F. Supp. 317 (W. D. Wisc., 1959), In re: Cameron, 166 F. Supp. 400 (S. D. Calif. 1958).

The latter case reversed the decision of the Referee who had held that the government was entitled

to post-bankruptcy interest pursuant to the ruling of the Ninth Circuit in Palo Alto Mutual Savings & Loan Assn. vs. Williams, supra. Both the Young and Cameron cases discuss the history and reasons for the denial of post-bankruptcy interest and conclude that a tax lien, being non-consensual, does not place the government in the class of secured creditors entitled to benefit from the third exception to the rule against payment of such interest. In considering this third exception in the Cameron case, Judge Yankwich stated:

"The situation thus contemplated was intended to protect the creditor in his security which, on liquidation, produced enough to satisfy the encumbrance. And herein lies the real distinction between the situation which the Court had before it in that case and a tax lien.

"An encumbrance is placed upon the property voluntarily by a debtor as security for his debt after agreement with the creditor. By doing so, the debtor authorizes not only the satisfaction of the debt out of the sale of the particular property, but agrees to the payment of any deficiency that might arise after the sale and that other property he may own may be subjected by execution to the payment of a deficiency judgment.

"In whatever legal proceeding the secured creditor takes to satisfy his debt, the debtor cannot, except in cases involving fraud, question the validity of the instrument or the amount of the debt which

it was given to secure. Prima facie, at least, the presumption is that it was voluntarily given for a debt actually owed. At most, the question might arise about any deductions for payments made. So the instrument itself settles most of the problems as to genuineness, due execution and the amount of the debt. This is not so in the case of a tax lien. The tax lien is merely an assertion by the Government that so much tax remains unpaid. The filing of the lien does not determine the tax as against the taxpayer. And, in any subsequent proceedings, whether brought by the Government to foreclose the lien or by the taxpayer who pays the assessment and sues for a refund or enjoins the Government after liquidation or seizure, or by the Government of the United States when it institutes the action to collect, the validity of the entire assessment and its exact amount are justiciable questions. Rightly. For otherwise, the taxpayer would be at the mercy of the humblest agent of the revenue service who capriciously levied an assessment. From long judicial experience, I know of assessments running into hundreds of thousands of dollars, which, after judicial inquiry, were found to have no foundation except a misinterpretation of the law by the officer levying the assessment concurred in by the Commissioner. So there are many cogent reasons for allowing post-bankruptcy interest in a case where a specific piece of property is impressed by the debtor with a mortgage or trust deed and appropriated, after mutual agreement between him and his creditor, to the payment of a specific debt, when, upon

liquidation, a surplus exists. But there is no justification for a distinction between ordinary taxes and taxes which are made the subject of a lien, which comes into being unilaterally and may be disputed as to validity and amount by the taxpayer in administrative and judicial proceedings, warranting the courts to depart from the salutary principle of disallowing interest in bankruptcy, except in certain extraordinary instances." (Footnotes omitted.)

Referee in Bankruptcy Rufus W. Reynolds of North Carolina followed similar reasoning in the Matter of G. N. Childress, reported at page 12 of the January, 1959, Journal of the National Association of Referees in Bankruptcy:

"Unlike liens based upon a voluntary contract entered into between individual parties, the tax liens here do not arise out of any transaction contributing a prior economic benefit to the bankrupt. Where the transaction is in the ordinary course of business, the lienholder extends something of value to his debtor and thus indirectly to others dealing with the debtor. Considerations of fair play thus impel the allowance to the lienholder, as against unsecured lesser creditors, of whatever he had the foresight to secure to the extent that his security will permit, including interest until payment. A taxing agency, however, has made no investment in the estate of the debtor, and when it seeks to recover interest it seeks to earn a return without having extended any economic benefit or taken any

economic risk. Therefore, while it is appropriate that general creditors should yield to secured creditors who have bargained for security itself sufficient to provide for the payment of interest, no similar appropriateness appears in forcing them to yield to a tax lien."

It is understood that the government has appealed the Childress case, involving both penalties and post-bankruptcy interest, to the Fourth Circuit after the District Judge affirmed the Referee's decision. See also In re Lykens Hosiery Mills, supra, which refused to allow post-bankruptcy interest on a tax lien claim.

In many cases the liquidation of the assets may take a considerable time, and in some cases no assets which be realized were it not for the efforts of the trustee and his attorney over that period of time. Often the debtor has terminated his business some time before bankruptcy, disposing of the physical assets and leaving only disputed claims and accounts receivable for the trustee. To allow this necessary delay to give the government a substantial windfall in post-bankruptcy interest at the expense of the other creditors would be highly unjust. The delay in distribution is an act of the law and a necessary incident to the settlement of the estate. No class of creditors should be allowed to profit at the expense of another because of a delay for which the law is responsible. United States vs. Edens, 189 F. 2d 876, 878 (4 CCA 1951) aff'd

342 U.S. 912; In re Industrial Machine & Supply Co., 112 F. Supp. 261, 263 (W.D.Pa. 1953).

In re Cameron, supra, involving the question of post-bankruptcy interest alone (although Judge Yankwich clearly indicated that he was opposed to the allowance of penalties also), has been appealed to the Ninth Circuit and this matter, upon which no circuit court has yet squarely ruled, should be settled in this circuit by the end of the year. Should the Fourth Circuit reach an opposite result in the Childress case, one of them will undoubtedly be carried to the U. S. Supreme Court to put the dispute to rest in a common grave. In the meantime I am constrained to follow the rules of equity, the spirit of the Bankruptcy Act and the weight of the majority rule on this specific question and sustain the trustee's objection to the claim of the United States to post-bankruptcy interest.

The trustee is directed to prepare an order based on these findings and conclusions, for the payment of the penalties included in claim No. 18 and disallowing all post-bankruptcy interest.

Entered at Portland, Oregon, this 14th day of August, 1959.

/s/ FOLGER JOHNSON, JR.,
Referee in Bankruptcy.

[Endorsed]: Filed August 14, 1959, Referee.

[Title of District Court and Cause.]

ORDER

This matter came regularly on for hearing on the trustee's objections to the claims of R. C. Granquist, District Director of the Internal Revenue Service, for tax penalties in the sum of $1,442.41 and for post-bankruptcy interest, said claims being included in Claim No. 18, in the files and records of this bankruptcy.

The trustee was represented by Asher & Cramer and Fred A. Granata, her Attorneys of record; R. C. Granquist was represented by Clarence E. Luckey, United States Attorney; Edward F. Georgeff, Assistant United States Attorney; John D. Picco, Special Assistant to Regional Counsel, Internal Revenue Service, and Jack T. Fuller, Attorney of Regional Counsel, Internal Revenue Service.

Both the trustee and the claimant submitted written briefs on which hearing was held. The Court, after due consideration of said written briefs, made its findings of fact and conclusions of law and entered same herein.

Now, therefore, based on said findings of fact and conclusions of law, it is hereby ordered as follows:

1. That the tax penalties claimed in Claim No. 18 in the amount of $1,442.41, be and the same hereby are allowed and the trustee be and she hereby is authorized and directed to pay said tax

penalties to R. C. Granquist, District Director of the Internal Revenue Service.

2. That post-bankruptcy interest claimed in Claim No. 18 be and the same hereby is disallowed.

Dated and entered this 20th day of August, 1959.

/s/ FOLGER JOHNSON, JR.,
Referee.

[Endorsed]: Filed August 20, 1959, Referee.

[Title of District Court and Cause.]

CERTIFICATE OF REFEREE ON PETITIONS OF THE DISTRICT DIRECTOR OF INTERNAL REVENUE AND THE TRUSTEE FOR REVIEW OF REFEREE'S ORDER ALLOWING PENALTIES BUT DISALLOWING POST-BANKRUPTCY INTEREST ON A FEDERAL TAX LIEN CLAIM

To the Honorable Judges of the Above-Entitled Court:

Folger Johnson, Jr., the Referee in Bankruptcy in charge of this proceeding, hereby makes this his certificate on the petition of the District Director of Internal Revenue and on the petition of the trustee, Hattiebelle O. Simonson, for review of the Referee's order entered August 20, 1959, wherein it was ordered that the trustee pay to the District Director of Internal Revenue the tax penalities in the amount of $1,442.41, included in Claim No. 18

in this proceeding, and further ordering that post-bankruptcy interest on the entire claim be disallowed.

Questions Presented

The only questions presented are whether

(1) The Referee erred in holding that the District Director of Internal Revenue in the Ninth Circuit is entitled to the payment of penalties included in a claim based on a Federal tax lien that arose prior to bankruptcy in spite of the provision in Section 57(j) of the Bankruptcy Act prohibiting the payment of penalties.

(2) The Referee erred in holding that post-bankruptcy interest is not allowable to date of payment of such Federal tax lien claim even though the lien arose prior to bankruptcy and proceeds from the sale of the bankrupt's assets were sufficient to pay such interest.

Facts

There is no dispute as to the facts. On December 3, 1957, the District Director of Internal Revenue filed his claim for income taxes in the amount of $5,821.69, including penalties and interest, and specifying that additional interest was claimed to the date of payment of such claim. Penalties included therein amounted to $1,442.41. This claim was registered in the proceeding as Claim No. 18.

The tax itself with interest to the date of bankruptcy was paid pursuant to order entered May 22,

1958, leaving unpaid the aforesaid penalties and post-bankruptcy interest in the sum of $182.49. The trustee filed an objection to the penalties and post-bankruptcy interest included in such claim. At the hearing thereon, it was agreed that this was solely a question of law and that the matter should be submitted to the Referee on briefs.

Discussion

A further statement of the facts and discussion of the law is set forth in the Referee's Findings and Conclusions entered August 14, 1959. It should be noted that In re: Cameron, 166 F. Supp. 400 (S.D. Calif. 1958) has been appealed by the District Director of Internal Revenue to the Ninth Circuit Court of Appeals. The only question involved in this case is the payment of post-bankruptcy interest on a Federal tax lien claim.

The Fourth Circuit Court of Appeals recently ruled against the District Director of Internal Revenue on the question of both penalties and post-bankruptcy interest on Federal tax lien claims, and this case may now be on appeal to the United States Supreme Court. U.S. vs. Harrington, decided August 6, 1959 (CCH Bankruptcy Law Reports, Paragraph 59587).

Papers Submitted

Transmitted herewith are the following papers:

1. Proof of claim No. 18, filed December 3, 1957, by the District Director of Internal Revenue.

2. Trustee's objections to said claim.
3. Notice of hearing on trustee's objections.
4. Memorandum in support of Internal Revenue claim.
5. Memorandum Brief of the United States.
6. Memorandum Brief of the trustee.
7. Supplemental Brief of the United States.
8. Referee's Findings and Conclusions.
9. Order of Referee Allowing Penalties and Disallowing Post-Bankruptcy Interest.
10. Stipulation for Extension of Time.
11. Motion for Extension of Time.
12. Order Allowing Extension of 30 Days to File Petition for Writ of Review.
13. Petition of District Director of Internal Revenue for Review of Referee's Order.
14. Petition of Hattiebelle O. Simonson, Trustee, for Review of Referee's Order.
15. Order for Stay Pending Review.

Dated at Portland, Oregon, this 8th day of October, 1959.

Respectfully submitted,

/s/ FOLGER JOHNSON, JR.,
Referee in Bankruptcy.

[Endorsed]: Filed October 9, 1959, U.S.D.C.

In the United States District Court
for the District of Oregon

No. B-41801

In the Matter of

MAX L. DRUXMAN,

Bankrupt.

ORDER

This matter came on upon the certificate of Referee Folger Johnson, Jr., a Referee in Bankruptcy of this Court, on the petitions of the District Director of Internal Revenue and the Trustee for review of the Referee's order allowing penalties but disallowing post-bankruptcy interest on a Federal tax lien claim duly made and entered herein by the said Referee on August 20, 1959, wherein it was ordered as follows:

1. That the tax penalties claimed in Claim No. 18 in the amount of $1,442.41, be and the same hereby are allowed and the trustee be and she hereby is authorised and directed to pay said tax penalties to R. C. Granquist, District Director of the Internal Revenue Service.

2. That post-bankruptcy interest claimed in Claim No. 18 be and the same hereby is disallowed.

The Court having considered the Referee's certificate aforesaid, the respective briefs of the parties, the findings and conclusions of said Referee

and the law of the matter, and being fully advised in the premises;

It Is Hereby Considered, Adjudged and Ordered that the aforesaid order of Folger Johnson, Jr., as Referee aforesaid, dated August 20, 1959, be and the same is hereby approved, ratified and affirmed in all respects.

Dated February 16, 1960.

/s/ WILLIAM G. EAST,
United States District Judge.

[Endorsed]: Filed February 16, 1960, U.S.D.C.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: R. C. Granquist, District Director of the Internal Revenue Service.

To: Clarence E. Luckey, United States Attorney.

Notice is hereby given that Hattiebelle O. Simonson, Trustee of the above-entitled estate, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that part of a certain order entered in this proceeding on February 16, 1960, by Hon. William G. East, a Judge of the United States District Court for the District of Oregon, allowing to R. C. Granquist, claimant, the tax penalties claimed in claim number 18 on file in this proceeding.

Dated this 11th day of March, 1960.

ASHER & CRAMER,

By /s/ FRED A. GRANATA,
Of Attorneys for Trustee-Appellant.

Service of copy acknowledged.

[Endorsed]: Filed March 11, 1960, U.S.D.C.

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH TRUSTEE-APPELLANT INTENDS TO RELY UPON APPEAL

Comes now the Trustee, Hattiebelle O. Simonson, and files the following statement of points upon which she intends to rely upon appeal to the United States Court of Appeal for the Ninth Circuit:

1. That the Court erred in allowing the tax penalties claim by R. C. Granquist, District Director of the Internal Revenue Service, said penalties being claimed in claim number 18 in the files and records of this proceeding.

ASHER & CRAMER,

By /s/ FRED A. GRANATA,
Of Attorneys for Trustee-Appellant.

Service of copy acknowledged.

[Endorsed]: Filed March 11, 1960, U.S.D.C.

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing documents consisting of Proof of Claim No. 18 by the District Director of Internal Revenue; Trustee's Objections to Claim No. 18; Notice of Hearing on Trustee's Objections; memorandum in support of Internal Revenue claim; memorandum brief of the United States; memorandum brief of the Trustee in Bankruptcy; supplemental brief of the United States; referee's Findings and Conclusions; order of referee allowing penalties and disallowing post-bankruptcy interest; stipulation for extension of time; motion for extension of time; order allowing extension of 30 days to file petition for review; petition of District Director of Internal Revenue for review; petition of trustee in bankruptcy for review; order of stay pending review; supplement to memorandum brief of the trustee; certificate of referee on petitions for review; clerk's minute entry of order affirming order of referee; order of the Honorable William G. East, District Judge, ratifying and affirming order of referee dated August 20, 1959; notice of appeal; designation of contents of record on appeal; statement of points upon which appellant will rely; supplemental designation of contents of record on appeal; and Clerk's bankruptcy docket sheet constitute the record on appeal from an order of said

court in a certain bankruptcy cause therein numbered B-41801, in the matter of Max L. Druxman, bankrupt, in which Hattiebelle O. Simonson, Trustee in Bankruptcy is the appellant and R. C. Granquist, District Director of Internal Revenue is the appellee; that said record has been prepared by me in accordance with the designations of record on appeal filed by the appellant and the appellee and in accordance with the rules of this court.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 13th day of April, 1960.

[Seal] R. DeMOTT,
Clerk.

By /s/ J. W. DAVIS,
Deputy.

[Endorsed]: No. 16878. United States Court of Appeals for the Ninth Circuit. Hattiebelle O. Simonson, Trustee in Bankruptcy of the Estate of Max L. Druxman, Bankrupt, Appellant, vs. R. C. Granquist, District Director of the Internal Revenue Service, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed April 19, 1960.

Docketed April 29, 1960.

/s/ FRANK H. SCHMID,
Clerk of the United States Court of Appeals for the Ninth Circuit.

[fol. 31a]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 16878

HATTIEBELLE O. SIMONSON, Trustee in Bankruptcy of the Estate of Max L. Druxman, Bankrupt, Appellant,

vs.

R. C. GRANQUIST, District Director of the Internal Revenue Service, Appellee.

[fol. 32] Before: Chambers, Hamley and Merrill, Circuit Judges.

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—January 6, 1961

This cause coming on regularly for hearing and submission Mr. Fred A. Granata, argued for the Appellant and Mr. Karl Schmeidler argued for the Appellee and thereupon, the court ordered this cause submitted for consideration and decision.

[fol. 33]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—February 1, 1961

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

[fol. 34]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 16,878

HATTIEBELLE O. SIMONSON, Trustee in Bankruptcy of the Estate of Max L. Druxman, Bankrupt, Appellant,

vs.

R. C. GRANQUIST, District Director of the Internal Revenue Service, Appellee.

Upon Appeal from the United States District Court for the District of Oregon.

OPINION—February 1, 1961

Before: Chambers, Hamley and Merrill, Circuit Judges.

Per Curiam:

This appeal is taken by the trustee of a bankrupt estate from the judgment of the District Court affirming an order of the Referee in Bankruptcy which allowed the United States a lien claim against the bankrupt estate in the sum of $1,442.41 for penalties on unpaid federal taxes.

Two questions are presented by this appeal.

The first question concerns the significance of the fact that although the lien of the United States arose prior to the filing of a petition in bankruptcy, notice of such lien was not filed until after the filing of the petition in bankruptcy. The trustee contends that under § 6323 of the Internal Revenue Code of 1954, 26 U.S.C. § 6323, the lien of the United States under these circumstances is invalid.

Section 6323 provides that the tax lien of the United States "shall not be valid as against a mortgagee, pledgee, purchaser or judgment creditor until notice thereof has been filed" in certain specified public offices.

[fol. 35] Section 70 of the Bankruptcy Act, 11 U.S.C. § 110, provides in part:

> "The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists."

The trustee contends that under § 70 he is by operation of law made a judgment creditor of the bankrupt; that under § 6323 of the Internal Revenue Code, as a judgment creditor, the lien of the United States is rendered invalid as to him.

The Supreme Court has interpreted § 6323 as limiting the class of persons who take priority over the unrecorded tax liens of the United States to judgment creditors (or purchasers, mortgagees or pledgees) in the conventional and ordinary sense of the words. United States v. Gilbert Associates, 1953, 345 U.S. 361; United States v. Security Trust and Savings Bank, 1950, 340 U.S. 47, 52.

The precise question presented by the instant case was presented to this court in United States v. England, 9 Cir., 1955, 226 F.2d 205. We there held that a trustee in bankruptcy could not, in the light of the Supreme Court's construction of the section, claim the status of judgment creditor under § 6323. Other courts have reached the same result. In re Fidelity Tube Corporation, 3 Cir., 1960, 278 F.2d 776; Brust v. Sturr, 2 Cir., 1956, 237 F.2d 135; see In re Tailorcraft Aviation Corporation, 6 Cir., 1948, 168 F.2d 808.

We adhere to our ruling in United States v. England and accordingly reject this contention of the trustee.

The second question presented by this appeal is whether a claim of the United States for penalties on unpaid taxes, upon which claim a lien arose prior to bankruptcy, is barred by § 57(j) of the Bankruptcy Act, 11 U.S.C. § 93:

> "Debts owing to the United States or to any State or any subdivision thereof as a penalty or forfeiture shall

[fol. 36] not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued on the amount of such loss according to law."

While the courts have divided upon this question, this court has held that § 57(j) does not apply to secured claims. In re Knox-Powell-Stockton Company, 9 Cir., 1939, 100 F.2d 979. To the same effect are United States v. Mighell, 10 Cir., 1959, 273 F.2d 682; Kentucky v. Farmers Bank, 6 Cir., 1943, 139 F.2d 266. Cases contrary to this court's position are: United States v. Harrington, 4 Cir., 1959, 269 F.2d 719; United States v. Phillips, 5 Cir., 1959, 267 F.2d 374.

We adhere to our ruling in Knox-Powell-Stockton and accordingly reject the contention of the trustee that § 57(j) invalidates the secured claim of the United States in this matter.

Affirmed.

HAMLEY, Circuit Judge (concurring):

Under section 6323(a) of the Internal Revenue Code of 1954, 26 U.S.C.A. § 6323(a), a tax lien of the United States is not valid against a "judgment creditor" until notice thereof has been filed. The notice of the lien here in question was not filed until after the bankrupt's property came into the possession or control of the bankruptcy court. Thus, if the trustee stands in the position of a judgment creditor within the meaning of section 6323, the lien is not valid as to the trustee.

Under section 70(c) of the Bankruptcy Act, 11 U.S.C.A. § 110(c), a trustee in bankruptcy is deemed to be vested as of the date particular property comes into the possession or control of the court, with "all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists." In my view this statute states as clearly as words can speak that a trustee is to be treated *as if* he were a judgment creditor, although obviously he is not one.

As pointed out in the majority opinion, several courts, including this one, have denied the trustee this section [fol. 37] 70(c) status. They have done so because in United States v. Gilbert Associates, 345 U. S. 361, 364, it was stated that section 3672(a) of the Internal Revenue Code, 56 Stat. 798, 26 U.S.C.A. (1946 ed.) § 3672(a), which was similar to section 6323(a) of the Internal Revenue Code of 1954, used the words "judgment creditor" in "the usual conventional sense of a judgment of a court of record, since all states have such courts."

This statement was made in Gilbert Associates in rejecting a contention that a New Hampshire statute which declared a tax assessment to be in the nature of a judgment had the effect of giving city tax liens judgment creditor status under the then section 3672(a). The Supreme Court thus denied to the states and local governments the right to appropriate to themselves by statutory fiat a defense against United States liens which the United States originally intended to be applicable only with respect to ordinary judgment creditors.

But the Supreme Court did not say, and had no reason to say, that Congress could not make available to trustees in bankruptcy a defense which it originally made available only to judgment creditors. The defense having been created by act of Congress, the same legislative body was free to extend its benefits however it pleased. I am thus in full agreement with the very exhaustive dissenting opinion of Judge Kalodner, joined in by Judge Hastie, filed in In re Fidelity Tube Corporation, 3 Cir., 278 F.2d 776, petition for writ of certiorari pending.

If the question discussed above were now before this court for the first time I would accordingly vote to reverse. Since, however, this court adopted a contrary view in United States v. England, 9 Cir., 226 F.2d 205, and Congress may, if it chooses, overturn that ruling for the future by enacting clarifying legislation, I am content to note the above views by way of a concurring opinion.

[File endorsement omitted]

[fol. 38] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 16878

HATTIEBELLE O. SIMONSON, ETC., Appellant,

vs.

R. C. GRANQUIST, ETC., Appellee.

JUDGMENT—Filed and Entered February 1, 1961

Appeal from the United States District Court for the District of Oregon.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

[fol. 38a]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MINUTE ENTRY OF ORDER DENYING PETITION FOR REHEARING—March 13, 1961

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of appellant, filed March 2, 1961 and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is, denied.

[fol. 39] Clerk's Certificate to foregoing transcript (omitted in printing).

No. 17066

United States Court of Appeals

for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

RICHARD D. HARRIS, Trustee for Alaska Telephone Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Western District of Washington, Northern Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF COUNSEL

Attorneys for Appellant:

THOMAS R. WINTER,
223 U. S. Courthouse,
1010 Fifth Avenue,
Seattle, Washington.

CHARLES P. MORIARTY &
JACOB A. MIKKELBORG,
1022 U. S. Courthouse,
1010 Fifth Avenue,
Seattle, Washington.

Attorney for Appellee:

DONALD A. SCHMECHEL,
Attorney for Richard D. Harris, Trustee
1010-1411 Fourth Avenue Building,
Seattle, Washington.

In the District Court of the United States for
The Western District of Washington
Northern Division

No. 41632

In the Matter of

ALASKA TELEPHONE CORPORATION,
Debtor.

NOTICE OF FILING PETITION FOR REVIEW

To: Richard D. Harris, Trustee for Alaska Telephone Corporation; and Donald A. Schmechel, Attorney for Richard D. Harris, Trustee:

You, and Each of You, will please take notice that the United States of America will file a Petitition for Review in the above-entitled cause, with the Honorable Van C. Griffin, Referee-Special Master, on February 18, 1959, a copy of which Petition is hereto annexed and made a part of this Notice.

/s/ CHARLES P. MORIARTY,
United States Attorney.

/s/ JACOB A. MIKKELBORG,
Assistant United States Attorney,

/s/ THOMAS R. WINTER,
Special Assistant to the Regional
Counsel, Internal Revenue Service.

[Title of District Court and Cause.]

PETITION FOR REVIEW

To: Honorable Van C. Griffin, Referee-Special Master.

The petition of the United States of America respectfully represents:

I.

Your petitioner, United States of America, is now and at all times herein mentioned was a sovereign and corporate body politic. The debtor is justly and truly indebted to the United States for taxes due under the Internal Revenue laws of the United States, as set forth in the verified claims of the United States filed on its behalf.

II.

On February 9, 1959, your Honor, as Referee-Special Master, entered an order herein, determining the liability for taxes of the United States, providing as follows:

"On due proceedings had, the Plan of Corporate Reorganization herein provided for the payment to the United States of $57,000.00 in full for its tax claim, which was duly certified by the Secretary of the Treasury and he did not reject said Plan within ninety (90) days, as provided by law, and therefore he is conclusively presumed to have accepted it and said sum has been duly paid to the United States of America and the Trustee and the assets of the estate and the Debtor are fully discharged from any and all claims of the United States for taxes, penalties and interest."

The said order was based on Findings of Fact and Conclusions of Law, finding and holding in substance:

1. That the Secretary of the Traasury did not properly file a notice of rejection of the plan of reorganization, as amended, with respect to the claims of the United States for taxes, as provided in Section 199 of the Bankruptcy Act;

2. That interest on the amounts deposited with the United States under an offer in compromise made prior to the reorganization proceeding by the debtor should be credited against the Government's claim for taxes;

3. That the United States is not entitled to post-bankruptcy proceeding interest on its tax claims which were liens on the debtor's property prior to said insolvency proceedings;

4. That the United States is not entitled to post-bankruptcy proceedings penalties on its tax claims which were liens on the debtor's property prior to the insolvency proceedings;

5. That the United States is not entitled to interest on the total assessments ten days after issuance of notice and demand, to and including September 30, 1955, the date the petition in the proceedings was filed.

III.

The United States of America respectfully assigns the following specifications of error in said Findings of Fact entered February 9, 1959, by the Honorable Referee-Special Master:

1. That the Referee erroneously determined that the evidence adduced by the hearing before said Referee was sufficient to support his finding that the order of the United States District Court of August 28, 1958,

requiring notice of rejection or acceptance of the Trustee's proposed plan, as amended, was duly served upon the Secretary of the Treasury, or was sufficient to determine the date of said service effective to commence running of the 90-day period within which acceptance or rejection according to the terms of the said order must be filed; (Referee's Finding of Fact I)

2. That the Referee erroneously determined that the acceptance or rejection of the Trustee's plan of reorganization, as amended, was improperly filed with the Clerk of the United States District Court, Western District of Washington, and erroneously concluded that the notice of rejection should have been filed with the Referee-Special Master, rather than with the Clerk of said United States District Court; (Referee's Finding of Fact II)

3. That the Referee erroneously determined that the notice of rejection was improper and of no effect by virtue of the fact that it was signed by the Acting Secretary of the Treasury without any showing or affirmation of his authority or capacity to so act, and without printing his name below his signature subscribed thereon, and that said irregularities, if any, were material matters of substance; (Referee's Finding of Fact III)

4. That the Referee erroneously determined that the notice of rejection was not effectively filed on December 26, 1958, within the 90 days specified by the order of the United States District Court Judge entered November 5, 1958, and Section 199 of the Bankruptcy Act, as amended; (Referee's Finding of Fact II)

5. That the Referee erroneously determined that the notice of rejection was improper and of no effect by

virtue of the fact that the notice of rejection by the Acting Secretary of the Treasury did not bear the name of an attorney for said Acting Secretary and his post office address, or the address of the Acting Secretary of the Treasury; (Referee's Finding of Fact III)

6. That the Referee erroeneously determined that the said notice of rejection by the Acting Secretary of the Treasury failed to comply with Section 199 of the Bankruptcy Act, as amended; (Referee's Findings of Fact II and III)

7. That the Referee erroneously determined that the Trustee of the debtor corporation is entitled to credit on the basis of interest on the sum deposited by the debtor corporation, prior to the Trustee's appointment, to secure an offer in compromise made by said corporation prior to institution of the bankruptcy proceedings in this cause, and that said Referee erroneously determined that interest accrued at six per cent in the sum of $3,863.81, or at any rate and amount; (Referee's Finding of Fact VI)

8. That the Referee erroneously determined that the conditional tender of the sum of $57,000.00 discharged all liability for taxes, interest, and penalities, thereby making unnecessary the determination of the correct tax liability, including penalties and interest on the assessments (designated by the Referee as compound interest), and post-bankruptcy proceeding interest on the said assessments until paid in full. (Referee's Finding of Fact VII)

IV.

The United States of America respectfully assigns the following specifications of error in said Conclusions of Law entered by the Honorable Referee-Special

Master, together with Findings of Fact on February 9, 1959:

1. That the Referee erroneously concluded that the claim of the United States of America has been paid by virtue of tender of the sum of $57,000.00, and that the United States of America has no further claim against the Trustee, the funds in his hands, or the debtor corporation; (Referee's Conclusion of Law 1.)

2. That the Referee erroneously concluded that Section 57(j) of the Bankruptcy Act, as amended, prohibits payment and collection of penalties from bankrupt estates after institution of bankruptcy proceedings where the tax claims, including penalties, are secured by liens perfected prior to filing of the petition under Chapter X proceedings, as in this cause; (Referee's Conclusion of Law 2.)

3. That the Referee erroneously concluded that interest is not allowable on the assessments duly made pursuant to the Internal Revenue laws of the United States, and erroneously concluded that authorities cited by said Referee are controlling of the issue as to interest in this cause; (Referee's Conclusion of Law 3.)

4. That the Referee erroneously concluded that the claim of the United States is diminished by reason of the deposit of a sum under an offer in compromise and interest on such sum deposited to secure said offer in compromise at any rate or amount based on such deposit; (Referee's Conclusion of Law 4.)

5. That the Referee erroneously concluded that interest accrued subsequent to commencement of insolvency proceedings should not be paid from the assets of the estate where the interest is based on assessments supported by liens perfected prior to commencement of

said proceedings, as provided by Section 57(j) of the Bankruptcy Act or other provisions thereof. (Referee's Conclusion of Law 4.)

V.

The Referee-Special Master's Order Determining Liability for Taxes of the United States is erroneous in that:

1. It purports to order that the plan of reorganization was approved and accepted by the United States of America upon the purported failure of the Secretary of the Treasury to reject said plan within 90 days, as provided by law, and further purporting to order that the claims for taxes, penalties and interest have been paid by the subsequent tender of a certified check in the sum of $57,000.00;

2. It fails to allow the claims of the United States in the total sum of $65,336.79 plus interest thereon at the rate of six per cent per annum from the dates of notice and demands, as provided by law, and until paid, except as to the sum of $182.86, which tax liability was not assessed until February 8, 1956, and notice and demand not made until after insolvency proceedings, or until January 27, 1956;

3. It fails to find and conclude that Julian A. Baird, as Acting Secretary of the Treasury, did properly certify by virtue of and pursuant to the provisions of Section 199 of the Bankruptcy Act that he rejected said plan of reorganization, as amended, with respect to the claims of the United States for taxes within the time properly allowed by law, and that the said plan, as amended, providing for the full payment to the United States of its taxes in the sum of $57,000.00 is rejected and not binding upon the United States of America;

4. It fails to allow and order paid post-bankruptcy interest on the tax claims and prior liens of the United States of America;

5. It fails to allow and order paid penalties assessed which were liens on the debtor's property prior to the bankruptcy proceedings, as provided by law;

6. It fails to enter the findings, conclusions and order as requested by the United States of America, claimant.

Wherefore, your petitioner prays that the Referee-Special Master certify to the Judge of this Court and transmit to the Clerk the record in said proceedings, as provided in the Bankruptcy Act, as amended.

United States of America

/s/ CHARLES P. MORIARTY,
United States Attorney.

/s/ JACOB A. MIKKELBORG,
Assistant United States Attorney.

/s/ THOMAS R. WINTER,
Special Assistant to the Regional Counsel,
Internal Revenue Service.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Feb. 13, 1959.

In the United States District Court for the Western District of Washington, Northern Division

No. 41632

In the Matter of

ALASKA TELEPHONE CORPORATION,

Debtor.

In Proceedings for the Reorganization of a Corporation.

REFEREE'S CERTIFICATE ON REVIEW

To the Honorable William J. Lindberg, United States District Judge:

This Will Certify that the undersigned Van C. Griffin, the Referee to whom the above-entitled cause was referred by General Order of Reference by the District Court of the United States to hear and determine all matters herein not specifically reserved by the Bankruptcy Act to the Judge, and as to those matters, to hear and report thereon.

That pursuant to said Order of Reference, the question for determining the liability for taxes of the United States came duly on for hearing, the United States being represented by its attorney and the Trustee being represented by his attorney. Witnesses were sworn, oral and documentary evidence was introduced, questions were asked by the Referee and answered by the attorneys and arguments were made and the Referee took the matter under advisement, and thereafter the Referee made, signed and filed his Opinion as to the tax claims of the United States of America and Findings of Fact, Conclusions of Law and Order Determining Liabilities of Taxes of the United States was presented, considered, signed and filed, and the United States has presented and filed its Petition for Review, and, in response thereto, the Referee certifies:

1. That the United States did not prepare, serve or file any Summary of the Evidence within the time fixed by law, or at all.

2. All of the issues determined by the Referee are set forth in the Findings of Fact and Order and his reasons therefore are set forth in his written Opinion, all of which are transmitted herewith, and the only issue presented for review is whether or not the Findings of Fact support the Order.

There is transmitted herewith:

1. Petition to Determine Proper Allowance of Claims of United States for Taxes and Objections Thereto.

2. Order Setting Hearing on Trustee's Petition to Determine Proper Allowance on Claims of United States of America for Taxes and Objections Thereto.

3. Affidavit of Donald A. Schmechel made January 26, 1959.

4. The Original Amended Plan and the Original of the Judge's Orders thereon are on file with the Clerk of the United States District Court and for that reason are not transmitted herewith.

5. Opinion of Referee-Special Master as to the Tax Claim of the United States of America.

6. Findings of Fact and Conclusions of Law.

7. Order Determining Liability for Taxes of the United States.

8. Petition for Review.

Dated at Seattle, in said District, April 8, 1959.

/s/ VAN C. GRIFFIN,
Referee in Bankruptcy.

[Endorsed]: Filed April 9, 1959.

[Title of District Court and Cause.]

PETITION TO DETERMINE PROPER ALLOWANCE OF CLAIMS OF UNITED STATES FOR TAXES AND OBJECTIONS THERETO.

To the Honorable Van C. Griffin, Referee in Bankruptcy of said Court:

Richard D. Harris, as Trustee of Alaska Telephone Corporation, the above named debtor, with reference to the claims of the United States of America for taxes, heretofore filed herein, respectfully submits:

I.

Neither the said debtor, nor the Trustee are now justly and truly indebted to the United States of America for the taxes set forth in the claim of the United States of America filed December 14, 1957 and identified as Claim No. 51 in these proceedings, a copy of which claim is attached hereto as Exhibit A and by this reference incorporated herein, for the reason that said taxes were incurred by the Trustee and paid in full by him on or about December 19, 1957 with a check drawn on the Bank of Petersburg, Alaska, in the amount of $895.85.

II.

The claim filed herein on February 4, 1956 under date of January 30, 1956, and identified as number 23, a copy of which is attached hereto as Exhibit B and by this reference incorporated herein, should be allowed in the amount of $176.82, the principal amount of the taxes, and disallowed for anything in excess thereof for the reason that any excess would be for penalties and interest and not recoverable.

III.

The claim filed herein on January 17, 1956 bearing date January 16, 1956, identified herein as claim number 16½, a copy of which is attached hereto labeled Exhibit C and by this reference incorporated herein, should

(A) Be allowed and paid in the amount of $57,000.00, in full payment thereof, for the reason that the Secretary of the Treasury did not file in the office of the Referee-Special Master a proper acceptance or rejection of the proposal to pay said amount within 90 days after receipt of notice to do so, and consent to the acceptance thereof is conclusively presumed under the bankruptcy statutes.

(B) In the alternative, in the event the Court declines to grant (A), the aforesaid claim should be allowed and paid only in the amount of $54,422.13, in full payment thereof, said sum being the correct principal amount of the taxes. The Trustee objects to any amount in excess of said $54,422.13 for the reason that any excess would constitute interest and penalties not recoverable in these proceedings.

Wherefore, Richard D. Harris, said Trustee, prays that an order be entered allowing the aforesaid claims as set forth above, sustaining his objections to any amounts in excess thereof, and for his costs, and such other relief as may be just and equitable.

/s/ RICHARD D. HANIS, (D.A.S.)
Trustee-Objectant.

/s/ DONALD A. SCHMECHEL
Attorney for Trustee-Objectant.

Office & P. O. Address:
1010-1411 Fourth Avenue Building,
Seattle 1, Washington.

EXHIBITS "A," "B" AND "C" ATTACHED

Duly Verified.

[Endorsed]: Filed Jan. 16, 1959.

FORM 2317 (March 1950)

U. S. TREASURY DEPARTMENT—INTERNAL REVENUE SE. .E

PROOF OF CLAIM FOR INTERNAL REVENUE TAXES

AMENDMENT #3 TO PROOF OF CLAIM DATED 1-30-56 10-27-55

IN THE UNITED STATES DISTRICT COURT

FOR THE (STATE) TERRITORY OF ALASKA
JUNEAU, ALASKA

IN THE MATTER OF:

ALASKA TELEPHONE CORP.
JUNEAU, ALASKA

DOCKET NO. .....

TYPE OF PROCEEDING BANKRUPTCY - CHAPT X

CLAIM OF THE UNITED STATES
FOR INTERNAL REVENUE TAXES

The undersigned officer of the Internal Revenue Service, a duly authorized agent of the United States in this behalf, being duly sworn, deposes and says that:

1. ALASKA TELEPHONE CORP. is justly and truly indebted to the United States in the sum of $807.37 with interest thereon as hereinafter stated;

2. The said debt is for taxes due under the internal revenue laws of the United States as follows:

KIND OF TAX AND PERIOD	AMOUNT DUE	REMARKS	DATE TAX LIEN AROSE
Withholding 12-31-55	$807.37		12-13-57

Filed this 14th day of Dec 1957
at 9 a.m. o'clock.
Sam L. Griffin

3. No part of said debt has been paid and the same is now due and payable at the Office of the District Director of Internal Revenue;
4. There are no set-offs or counterclaims to said debt;
5. Except for the statutory tax liens which arose on the dates above stated, the United States does not hold, to the deponent's knowledge or belief, any security or securities for said debt;
6. No note or other negotiable instrument has been received for said debt or any part thereof, nor has any judgment been rendered with respect to said debt; and
7. Said debt has priority and must be paid in full in advance of distribution to creditors as and to the extent provided by law:

IN BANKRUPTCY ACT PROCEEDINGS see Sections 64, 77e, 199, 337(2), 455, and 659 of the Bankruptcy Act (11 U.S.C. 104, 205(e) 599, 737(2), 855, and 1059).

IN OTHER PROCEEDINGS see Section 3466 of the Revised Statutes (31 U.S.C. 191). Also, attention is invited to Section 3467 (31 U.S.C. 192) with respect to the personal liability of any executor, administrator, or other person who fails to pay the claims of the United States in accordance with their priority.

SUBSCRIBED AND SWORN TO BEFORE ME THIS 13 day of December 1957 Rose A. Osage Notary Public	SIGNATURE James L. Milan James L. Milan TITLE Acting Chief, DAR Branch Office of the District Director of Internal Revenue ADDRESS P. O. Box 1583 Tacoma, Washington

U. S. GOVERNMENT PRINTING OFFICE : 1957—O-417486

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IN THE DISTRICT COURT FOR THE Western DISTRICT OF WASHINGTON
Northern DIVISION

In the Matter of

Alaska Telephone Corp) Index or Docket No. 41632
Chapter X
) In Bankruptcy

State of Washington
County of Pierce } ss

CLAIM OF UNITED STATES FOR TAXES

William E Frank, Director of Interna. Revenue for the District of Washington, a duly authorized agent for the United States in this behalf, being duly sworn, deposes and says:

1 That taxpayer (s) above named, is justly and truly indebted to the United States in the sum of $ 301.73, with interest thereon as hereinafter stated.

2 That the nature of the said debt is Internal Revenue taxes due pursuant to law as follows:

Nature of Tax and Statute Involved	Year or Taxable Period Ended	Amount of Tax	With Interest at the rate of 6% per annum until paid. Interest began:	Assmt List Recd
FUTA	1953 Addl	301.73	None Claimed No Lien Filed	1-27-56

Filed this 4th day of February 19 56
9 am o'clock.

Filed this 4th day of February 1956
at 9 am o'clock.
Sam L. Griffin

3 That no part of said debt has been paid, but that the same is now due and payable at the offiee of the Director of Internal Revenue at Tacoma, Washington.

4 That there are no set-offs or counterclaims to said debt.

5 That the United States does not hold, and has not, nor has any person by its order, or to deponent's knowledge or belief, for its use, had or received, any security or securities for said debt, except statutory liens.

6 That the said indebtedness is now due and payable; that no note or other negotiable instrument has been received for said debt or any part thereof; and that no judgment has been rendered thereon.

7 That said debt has priority, and must be paid in full in advance of distribution to creditors, as and to the extent provided in Section 64 or Section 659 of the Bankruptcy Act, Section 3466 of the Revised Statutes, or other applicable provisions of law. Attention is also called to the provisions of Section 3467 of the Revised Statutes, with respect to the personal liability of every executor, administrator, assignee or other person who fails to pay the claims of the United States in accordance with their priority.

Dated this 30 day of January 1956

William E Frank
District Director of Internal Revenue
For the District of Washington
By
E Jarrett
Chief Spec Pro Sec

Subscribed and sworn to before me this 30 day of January 1956

Marcell K. Hay
Notary Public

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This Proof of Claim filed - Chapt X voids Proof of dated 10-27-55 filed under Chapt XI.

IN THE DISTRICT COURT OF THE United States DISTRICT OF WASHINGTON
Northern DIVISION

In the Matter of

Alaska Telephone Corp) Index or Docket No. 41632

) In Bankruptcy Chapter X

State of Washington
County of Pierce } ss

CLAIM OF UNITED STATES FOR TAXES

William E Frank, Director of Internal Revenue for the District of Washington, a duly authorized agent for the United States in this behalf, being duly sworn, deposes and says:

1 That taxpayer (s) above named, is justly and truly indebted to the United States in the sum of $ 65,559.43, with interest thereon as hereinafter stated.

2 That the nature of the said debt is Internal Revenue taxes due pursuant to law as follows:

Nature of Tax and Statute Involved	Year or Taxable Period Ended	Amount of Tax	With Interest at the rate of 6% per annum until paid. Interest began:	Asmt List Recd

SEE STATEMENT ATTACHED

Filed this 17th day of Jan 1956

Filed this 17th day of Jan 1956
at 9 AM o'clock.
Jan L. Griffin
REFERER

3 That no part of said debt has been paid, but that the same is now due and payable at the office of the Director of Internal Revenue at Tacoma, Washington.

4 That there are no set-offs or counterclaims to said debt.

5 That the United States does not hold, and has not, nor has any person by its order, or to deponent's knowledge or belief, for its use, had or received, any security or securities for said debt, except statutory liens.

6 That the said indebtedness is now due and payable; that no note or other negotiable instrument has been received for said debt or any part thereof; and that no judgment has been rendered thereon.

7 That said debt has priority, and must be paid in full in advance of distribution to creditors, as and to the extent provided in Section 64 or Section 659 of the Bankruptcy Act, Section 3466 of the Revised Statutes, or other applicable provisions of law. Attention is also called to the provisions of Section 3467 of the Revised Statutes, with respect to the personal liability of every executor, administrator, assignee or other person who fails to pay the claims of the United States in accordance with their priority.

Dated this 16 day of January 1956

Subscribed and sworn to before me this 16 day of January 1956

Marcil L. Hay
Notary Public

William E Frank
District Director of Internal Revenue
For the District of Washington
By J. R. Leavitt
Chief Spec Pro Sec

TAC-57a

16½

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Receipt of Original of within claim is hereby acknowledged this _____ day of _____ 19___

_____
Name and Title

Receipt of Duplicate original of within claim is hereby acknowledged this _____ day of _____ 19___

_____
Name and Title

Index or Docket No. _____ Year _____

IN THE MATTER OF

_____

CLAIM OF THE UNITED STATES FOR TAXES

District Director of Internal Revenue
District of Washington

United States Attorney
District of Washington

To: _____

State of Washington
County of Pierce } ss

Rose Osage, being duly sworn, deposes and says that

rnal Revenue

S FOR TAXES

Year

State of Washington
County of Pierce } ss

Rose Osage, being duly sworn, deposes and says that she is over the age of 18 years and resides at Tacoma, Washington that on the 16 day of January 19 56, she served an original claim of which the within is a copy, on Alaska Telephone Corp by depositing the claim in the mails in a securely sealed, postpaid wrapper addressed to the Attorney Patterson, Maxwell & Jones 428 White Henry Stuart Bldg Seattle, Wash at his office at

Subscribed and sworn to before me this

16 day of January 19 56 Rose Osage Rose Osage

Marcella Ray Marcella L. Ray
Notary Public

TAC-57

Lien	Tax	Period	Amount	Int at 6% from --		Asmt List Recd
24571	WE	3-31-52	$608.84 Bal	3-6-53 to 11-21-55 =	$129.98	3-5-53
Filed King Co 12-8-53				5% Coll Pen	131.20	
24571	WE	6-30-52	1923.02 Bal	3-6-53 to 11-21-55 =	$418.89	"
Filed King Co 12-8-53				5% Coll Pen		
24571	WE	9-30-52	6613.75	3-6-53 to 11-21-55		"
Filed King Co 12-8-53						
24571	WE	12-31-52	5801.08 Bal	3-6-53 to 11-21-55 =	$936.44	"
Filed King Co 12-8-53						
24963	WE	3-31-53	6265.64	5-13-53 to 11-21-55		5-12-53
Filed King Co 12-8-53						
26099	WE	6-30-53	7755.29	8-19-53 to 11-21-55		8-19-53
Filed King Co 12-8-53						
27465	WE	9-30-53	6051.23	11-6-53 to 11-21-55		11-6-53
Filed King Co 12-8-53						
24571	MT	2/52-12/52	21,406.71	3-6-53 to 11-21-55		3-5-53
Filed King Co 12-8-53						
24949	MT	1/53-3/53	4633.16	4-30-53 to 11-21-55		4-29-53
Filed King Co 12-8-53						
26099	MT	4-53	51.56	7-20-53 to 11-21-55		7-20-53
Filed King Co 12-8-53						
26099	MT	6-53	1064.31	8-18-53 to 11-21-55		8-18-53
Filed King Co 12-8-53						
27775	MT	9-53	3384.14	11-20-53 to 11-21-55		11-20-53
Filed King Co 2-16-54						
		Total	$ 65,559.43			

26099 Filed King Co 12-8-53	MT	6-53	1064.31	8-18-53 to 11-21-55	8-18-53
27775 Filed King Co 2-16-54	MT	9-53	3384.1m	11-30-53 to 11-21-55	11-20-53

Total $ 65,559.43

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[Title of District Court and Cause.]

ORDER SETTING HEARING ON TRUSTEE'S PETITION TO DETERMINE PROPER ALLOWANCE ON CLAIMS OF UNITED STATES OF AMERICA FOR TAXES AND OBJECTIONS THERETO

This matter having come on duly before the undersigned Referee-Special Master in the above proceedings, upon the verified petition of Richard D. Harris, Trustee, petitioning the court to determine the proper allowances on claims of the United States of America for taxes and objections to said claims, now, therefore, it is hereby

Ordered, Adjudged and Decreed:

1. That a hearing will be held before the Honorable Van C. Griffin, Referee-Special Master, in Room 601, U. S. Court House, Seattle, Washington, at 10:00 a.m. on the 26 day of January, 1959, upon the petition of the Trustee to determine the proper allowances to be made on the claims of the United States of America for taxes, and certain objections to said claims, which hearing may be continued from time to time without further notice except the announcement of the continued hearing at said time.

2. The Trustee is directed to have a certified copy of this order and a copy of said petition (a) served upon the United States Attorney for the Western District of Washington at Seattle, Washington, on or before the 16 day of January, 1959, and (b) mailed to the Secretary of The Treasury, Washington, D.C. and the District Director of Internal Revenue, at Tacoma, Washington, on or before the 16 day of January, 1959,

and such notice shall be deemed good and sufficient notice of said hearing.

Dated this 16 day of January, 1959.

/s/ VAN C. GRIFFIN,
Referee-Special Master.

Presented by:

/s/ DONALD A. SCHMECHEL,
Donald A. Schmechel,
Attorney for Richard D. Harris, Trustee.

[Endorsed]: Filed Jan. 16, 1959.

[Title of District Court and Cause.]

AFFIDAVIT OF MAILING

State of Washington, County of King—ss.

Donald A. Schmechel makes solemn oath that he is over the age of twenty-one (21) years and is not a party to this proceeding.

That on the 30th day of September, 1958, he air mailed a certified copy of the attached Plan of Reorganization, a copy of the attached Notice, and the original of the attached receipt to the Secretary of the Treasury, Washington 25, D.C., by depositing the same in the post office, addressed to said party at the address indicated above, airmail postage prepaid.

/s/ DONALD A. SCHMECHEL.

Subscribed and sworn to before me this 26th day of January, 1959.

HELEN BENCH,
[Seal] Notary Public in and for the State of Washington, residing at Seattle.

[Title of District Court and Cause.]

ORDER PRESCRIBING FORM OF NOTICE TO SECRETARY OF TREASURY TO ACCEPT OR REJECT PLAN.

Upon the annexed petition of Richard D. Harris, Trustee of the Alaska Telephone Corporation, the above named debtor, verified the 22nd day of September, 1958, praying that the notice to the Secretary of the Treasury to accept or reject the plan for the reorganization of said debtor, approved by this Court under Section 174 of the Act of Congress relating to Bankruptcy on the 28th day of August, 1958, shall be in the form and manner proposed in the said petition, and it appearing that no notice of a hearing thereon should be given, and good cause appearing to me therefor, it is

Ordered that Richard D. Harris, said Trustee, within ten (10) days after the entry of this order, be, and he hereby is, directed to serve upon the Secretary of the Treasury, Washington, District of Columbia, personally or by mail, the following written notice:

In the United States District Court for the Western District of Washington, Northern Division

No. 41632

In the Matter of

ALASKA TELEPHONE CORPORATION,

Debtor.

In Proceedings for the Reorganizations of a Corporation.

To the Secretary of the Treasury, Washington, District of Columbia:

Notice is Hereby Given that with respect to the unsecured claim of the United States of America for taxes in the amount of $65,559.43 against the above

named debtor, you are required, not more than ninety (90) days after the receipt of this notice, to file in this Court your acceptance or rejection of the plan for the reorganization of said debtor, approved by this Court under Section 174 of the Act of Congress relating to Bankruptcy, on the 28th day of August, 1958, a certified copy of which plan accompanies this notice, and under which plan the United States of America is to receive the sum of $57,000.00 in cash, after consummation of said plan, in full settlement thereof; and upon your failure so to do, your consent to the said plan shall be conclusively presumed.

By Order of the Court.

Dated this 22nd day of September, 1958.

/s/ RICHARD D. HARRIS,
Trustee.

which notice shall be accompanied by a certified copy of the said plan; and it is further

Ordered that the said Trustee file proof of receipt by the Secretary of the Treasury of said notice accompanied by a certified copy of said plan and of the date of such receipt.

Dated this 22nd day of September, 1958.

/s/ WILLIAM J. LINDBERG,
District Judge.

Presented by
/s/ DONALD A. SCHMECHEL
of Wright, Innis, Simon & Todd
Attorneys for
Richard D. Harris,
Trustee.

[Title of District Court and Cause.]

RECEIPT

Receipt is hereby acknowledged of the following documents:

1. Certified copy of Amended Final Plan of Reorganization.

2. Conformed copy of Petition for Form of Notice to Secretary of Treasury to Accept or Reject Plan.

3. Conformed copy of Order Prescribing Form of Notice to Secretary of Treasury to Accept or Reject Plan.

Dated this ..... day of October, 1958.

Secretary of the Treasury

By: _____

[Title of District Court and Cause.]

AMENDED FINAL PLAN OF REORGANIZATION OF ALASKA TELEPHONE CORPORATION, DEBTOR, A PUBLIC UTILITY

August 28, 1958

Classes of Creditors and Stockholders of the Debtor:

1. The United States of America with respect to all claims for taxes against said debtor.

2. The United States of America with respect to claims against said debtor other than claims for taxes.

3. Any state, territory, or political subdivisions thereof, with respect to claims for taxes against said debtor.

4. To be treated equally as one class:

(a) Holders of all unsecured general claims against the debtor.

(b) Holders of all debentures issued by the debtor corporation, including Series A, Series B, Series C, and Series D, and all other creditors holding claims against the debtor.

Article I.

Who Makes Offer

This offer is being made by and on behalf of the following persons, who propose to purchase, and assume management and financing. of the debtor corporation, and are hereinafter called proponents:

Blanchett, Hinton & Jones, Inc., Seattle securities and investment firm.

C. Spencer Clark, Chairman of the Board, Cascade Natural Gas Company and Executive Vice-President, Northern Ontario Natural Gas Company.

E. B. Clark, Seattle investor.

Irving Clark, Jr., Seattle Lawyer and real estate broker.

Darrah Corbet, President, Smith Cannery Machines Company, and Director, National Bank of Commerce of Seattle.

Article II.

Provisions Altering or Modifying the Rights of Creditors

A. All claims included in Classes 1, 2, and 3 are to be paid in cash in full by the Trustee, in such amounts as may be finally allowed by the Court, without any interest thereon, except as to the following two claims, which may be paid in installments in the amount and manner determined by the Court:

(1) Claim of the United States of America; Claim No. 16½ for $65,558.48.

(2) Claim of the United States of America; Claim No. 50 for $7,054.67.

B. Creditors in Class 4(a) and Class 4(b): Holders of general claims and holders of old debentures, upon the confirmation of the plan, shall be entitled to receive from the Trustee the balance of the funds paid in by proponents under this plan, pro rata according to the dollar value of their claims, which shall then be extinguished by the Trustee.

Article III.

Provisions for the Payment of Administration Expenses and Other Allowances

All costs, obligations and expenses of administration and other allowances which may be made by the Judge in this proceeding under Chapter XI of the Bankruptcy Act and Under Chapter X of the Bankruptcy Act, shall be paid in cash by the trustee, as the Judge shall direct.

Article IV.

Provisions for Classes of Creditors Which Are Affected by and Do Not Accept the Plan by the Requisite Majority

In respect of any Class of Creditors which is affected by and does not accept the plan by the two-thirds majority in amount required under Chapter X of the Act of Congress relating to bankruptcy, adequate protection for the realization by them of the value of their claims against the property dealt with by the plan and affected by such claims shall be provided in the order confirming the plan by any one or more of the methods prescribed by Section 716(7) of the said Act.

Article V.

Property Dealt with by the Plan

The offer made herewith is to acquire Alaska Telephone Corporation, including stock equites and all other property, tangible or intangible, for $230,000.00, payable on or before confirmation of this plan, $25,000.00 of which has heretofore been paid to the Trustee. The Trustee will issue new stock to proponents in consideration of this payment. All properties of the debtor will pass to proponents free and clear of all liens, except as specified in Article VI.

Article VI.

Obligations to Be Assumed

Proponents agree that their acquisition of the debtor corporation will carry with it the following obligations, and only the following obligations, which will then cease to be the obligations of the Trustee:

A. The contract balance remaining to be paid to Automatic Electric Sales Corporation for the Seward central office equipment, which balance is believed to be in the amount of $41,500.00.

B. The duties of the corporation under the contract made by the Trustee for the construction of a central office building in Seward, the total obligation on which is believed to be in the approximate amount of $30,000.00.

C. Any liability of the corporation by reason of customer deposits as of the day assets and operations are actually taken over by proponents, which cash deposits will pass under Article V hereof.

Proponents specifically disclaim and decline to assume any other obligations whatever of the corporation.

Article VII.

Future Plans of Proponents

Proponents hereby specifically agree that they are taking over the debtor for the purpose of continuing to carry on the telephone business in the four municipalities involved for a period of three years, or until such time as an Alaska public service commission, or some such regulatory agency, by whatever name it may be called, assumes jurisdiction of the regulations of the telephone business in Alaska, whichever shall occur first.

Article VIII.

Provisions for the Retention, Enforcement, Settlement, or Adjustment of Claims Belonging to the Debtor or to the Estate

All causes of action which the debtor or its Trustee may have against any persons shall be retained by the Trustee and enforced by him for the benefit of the holders of claims classified as Class 4 against the debtor.

Respectfully submitted,

BLANCHETT, HINTON & JONES, Inc.
C. SPENCER CLARK
E. B. CLARK
IRVING CLARK, JR.
DARRAH CORBET
(Sgn) IRVING CLARK, JR.

By: IRVING CLARK, JR., their attorney
1090 Dexter Horton Building
Seattle 4, Washington
Phone: MUtual 2-0080

[Title of District Court and Cause.]

PETITION FOR FORM OF NOTICE TO SECRETARY OF TREASURY TO ACCEPT OR REJECT PLAN

To the Honorable William J. Lindberg, Judge of the District Court of the United States for the Western District of Washington, Northern Division:

The petition of Richard D Harris respectfully represents:

I.

On the 30th day of September, 1955, a petition was filed herein by Alaska Telephone Corporation, the above named debtor, praying that proceedings be had under Chapter XI of the Act of Congress relating to Bankruptcy, and thereafter on the 21st day of November, 1955, an order was entered herein approving the amendment of said petition to bring the proceedings under Chapter X of the Bankruptcy Act and approving such amendment and appointing your Petitioner as Trustee of said debtor under said Chapter X. Your Petitioner has duly qualified and is now acting as such Trustee.

II.

Your Petitioner prepared, and on the 9th day of May, 1958, filed a plan for the reorganization of said debtor pursuant to Section 169 of the said Act, and thereafter other plan for the reorganization of said debtor were prepared and filed, and in an order entered by the above entitled Court on August 28, 1958, the plan known as the Clark Plan was approved by this Court under Section 174 of the said Act, and the Court has fixed October 13, 1958, as the time within which creditors affected thereby may accept the same.

III.

The United States of America is an unsecured creditor of the said debtor and asserts a claim for taxes, including interest and penalties, in the amount of $65,-559.43, as evidenced by the claim identified as Claim No. 16½ in these proceedings and filed on January 17, 1958.

IV.

The aforesaid Clark Plan for the debtor's reorganization does not provide for the payment of the said claim of the United States in full, but does provide for the payment of $57,000.00 in full settlement thereof. Prior to the institution of these proceedings on September 30, 1955, the debtor entered into an offering in compromise under date of June 11, 1954, which contemplated the settlement of all of the taxes, including penalties and interest, involved in the aforesaid Claim No. 16½, for the total sum of $57,000.00 payable in installments. Prior to September 30, 1955, the debtor had deposited a total of $40,000.00 with the United States of America pursuant to the aforesaid offer in compromise, and thereafter, pursuant to a hearing in these proceedings with notice to the United States of America, an order was entered by the Court on the 27th day of November, 1957, directing the United States of America to return the aforesaid $40,000.00 to Petitioner, and said $40,000.00 has since been returned. That under the aforesaid Clark Plan, the $57,-000.00 to be paid to the United States of America in full settlement of the aforesaid claim will be paid after consummation of the plan, when authorized by the Court.

V.

Service by mail or in person upon the Secretary of the Treasury, at Washington, District of Columbia, of the following written notice to accept or reject the said plan is adequate notice thereof.

In the United States District Court for the Western District of Washington, Northern Division

No. 41632

In the Matter of

ALASKA TELEPHONE CORPORATION,

Debtor.

In Proceedings for the Reorganization of a corporation.

To the Secretary of the Treasury, Washington, District of Columbia:

Notice Is Hereby Given that with respect to the unsecured claim of the United States of America for taxes in the amount of $65,559.43 against the above named debtor, you are required, not more than ninety (90) days after the receipt of this notice, to file in this Court your acceptance or rejection of the plan for the reorganization of said debtor, approved by this Court under Section 174 of the Act of Congress relating to Bankruptcy, on the 28th day of August, 1958, a certified copy of which plan accompanies this notice, and under which plan the United States of America is to receive the sum of $57,000.00 in cash, after consummation of said plan, in full settlement thereof; and upon your failure so to do, your consent to the said plan shall be conclusively presumed.

By Order of the Court.

Dated this 22nd day of September, 1958.

/s/ RICHARD D. HARRIS,
Trustee

Wherefore your Petitioner prays that this Court prescribe that the notice to the Secretary of the Treasury

to accept or reject the said plan shall be in the form and manner as aforesaid, and that your Petitioner have such other and further relief as is just.

/s/ RICHARD D. HARRIS,
Trustee

State of Washington, County of King—ss.

I, Richard D. Harris, the Petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

/s/ RICHARD D. HARRIS,
Trustee.

Subscribed and sworn to before me this 22nd day of September, 1958.

/s/ C. M. DWYER
[Seal] Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed Jan. 27, 1959.

[Title of District Court and Cause.]

OPINION OF REFEREE-SPECIAL MASTER AS TO THE TAX CLAIM OF THE UNITED STATES OF AMERICA.

From the evidence introduced and from failure of parties to introduce evidence which was within their knowledge or possession and from the records and files herein, the Referee-Special Master Finds, Concludes and Decides:—

That on or about the 21st day of November, 1955, the Honorable William J. Lindberg, Judge of the United

States District Court before whom this matter was and is pending, entered an Order Approving the filing of the Debtor's Petition under Chapter X and a part of that Order referred all matters herein to Van C. Griffin, as Referee-Special Master, to hear and determine, except such matters as are specifically reserved to the Judge by the terms of the Bankruptcy Act and said Order has never been modified and the question of the tax of the United States is not specifically reserved to the Judge and at all times has been and now is before the Referee-Special Master for determination.

A copy of said Order and a copy of the Notice and proposed Plan was duly served upon the Secretary of the Treasury and he did not, as hereinafter mentioned, accept or reject said Plan for a period of more than ninety (90) days, and he is therefore conclusively presumed to have accepted the Plan.

The Secretary of the Treasury took no action in respect to the Notice and Order served upon him under the terms of Section 199 of the Bankruptcy Act, except there was, on December 26, 1958, filed with the Clerk of the United States District Court a paper denominated "Notice of Rejection of the Trustee's Plan", but, after due examination and consideration, the Referee Special Master Finds, Concludes and Decides that said Notice was wholly ineffectual to express the rejection thereof for the following reasons.

1. It was not signed by the Secretary of the Treasury.

2. The purported signature is not legible, is not the signature of the Secretary of the Treasury and on the face of said Notice and nowhere else in the record is there any showing as to the incapacity of the Secre-

tary of the Treasury for any reason or why anyone should act for him or any showing that he authorized anyone to act for him and not even affirmation or acknowledgement by the person so acting as to what, if any, authority he had to act and what, if any, official capacity he enjoyed. this Referee being unable to find anything in the statute creating the office of Acting Secretary of the Treasury.

3. Rule XI of the Rules of Civil Procedure provides that every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address.

Rule 16 of the Local Rules of the United States District Court for the Western District of Washington provides that names shall be typed or printed under all signatures to pleadings.

The purported Rejection did not comply with these rules and, being illegible, the violation is material.

The provisions of the Plan of Corporate Reorganization are therefore conclusively presumed to be accepted by the Secretary of the Treasury and the Trustee therefore will pay to the Secretary of the Treasury the sum of $57,000.00 and that sum may be paid independently of any Review or appeal from Orders pertaining to the United States tax claim and may be accepted by the United States without prejudice to its right to claim a greater sum, but when said sum is tendered to the United States is no event is interest thereafter to be charged or allowed.

The Referee-Special Master is confident that the foregoing decision is sound but, in order to avoid the possible necessity of a second review or appeal, wishes

to go forward and decide the issues tendered and tried by the parties and that is as to what amount would now be due the United States if the Secretary of the Treasury had, in law and in fact, rejected the amount set forth in the Plan of Corporate Reorganization. The Director of Internal Revenue offered certified copies of the assessment as tending to prove the amount of the tax. The Debtor, prior to these proceedings, made an offer in compromise and paid thereon the sum of $40,000.00, which sum was retained by the United States until an Order was entered in these proceedings directing that he return the money to the Trustee herein.

A certain part of the tax included in the United States claim has been paid and a certain part of the tax was not chargeable to the Debtor, but was chargeable to and paid by the Trustee herein, and it also appears that in making the assessment the Director, in some instances, compounded the interest and when that situation is developed, it is the duty of the Court to receive evidence outside of the assessment and determine the amount of tax. In fact, there is little or no dispute as to the principle amount of the tax except that the Trustee contends that the excise tax was reported upon an accrual basis, based upon the billing for telephone service whereas it developed that a substantial portion of these bills were never paid and it would therefore be unjust to charge the tax on the payment of a debt that was never collected. However, the Trustee was not prepared to prove with certainty the exact amount of credit that should be given so the Referee-Special Master is going to adopt the principal tax as established by the assessment records of the Director, which seems to indicate, in view of all the evidence, is the sum of $56,382.93 of unpaid principal tax.

The conflict of authorities as to whether or not penalties included in tax liens may be paid by the Trustee out of the funds in the estate and the payment by the Trustee of post-bankruptcy interest is, upon closer examination, more apparent than real. For instance, the case of Knox-Powell Stockton Company, reported in 33 American Bankruptcy Reports, page 766, 100 Federal 2nd, 979, was one in which the adjudication occurred in May of 1933 and was long before the passage of the Chandler Act and other amendments relating to the issues here. Some of the cases referred to arose out of a debt secured by a mortgage, but those are distinguishable because in those cases there was a voluntary advancement of funds secured by an orthodox mortgage and the funds enriched the estate, whereas the tax is an obligation imposed and in a sense does not contribute to the assets of the estate to the same extent as does money loaned on a mortgage.

In the case of

In the Matter of G. N. Childress, etc. in the U. S. District Court for the middle District of North Carolina, decided by the Referee about April, 1958, and reported in full in the Journal of the National Association of Referees in Bankruptcy for January, 1959, at page 12, the authorities are collected and the reasons given which this Court adopts as its own, and this Court is reliably advised that the referee's decision was affirmed upon review by the District Court, altho that may now be on appeal to the Circuit Court.

Findings of Fact and Order in conformity with this Opinion may be presented to the Court at 10 o'clock A.M. on Friday, January 30th, 1959.

Dated at Seattle, in said District, January 27, 1959.

/s/ VAN C. GRIFFIN,
Referee-Special Master.

[Endorsed]: Filed Jan. 27, 1959.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Trustee's Petition to determine proper allowances of claims to the United States for taxes and Objections thereto came duly on for hearing, the Trustee appearing in person and by his attorney, Donald A. Schmechel, and the United States appearing by Thomas R. Winter, Special Assistant to the Regional Counsel for the Internal Revenue Service, and Jacob A. Mikkelborg, Assistant United States District Attorney, and oral and documentary evidence was introduced, the matter was argued to the Court and the Court made and entered its Memorandum Decision herein and now makes the following

Findings of Fact

I.

That heretofore and on or about September 22, 1958, and on due proceedings had, Judge William J. Lindberg made and entered an Order Prescribing Form of Notice to the Secretary of the Treasury to accept or reject Plan, which notice provided that under the Plan herein the United States of America was to receive the sum of $57,000.00 in cash in full settlement of its tax claim and that, upon its failure to reject said Plan, the consent to said Plan shall be conclusively presumed, and said Notice was duly served upon the Secretary of the Treasury of the United States.

II.

On or about the 21st day of November, 1955, by a General Order of Reference, Judge William J. Lindberg referred all matters in these proceedings to Van

C. Griffin, Referee-Special Master, except such matters as are by law reserved to the Judge, and this question of acceptance or rejection is not specifically reserved to the Judge and is therefore before the Referee-Special Master and no acceptance or rejection of any kind was served or filed with the Referee-Special Master or with his clerk, or at all, and the matter did not come to his attention until long after the ninety (90) days, referred to in said Notice, had expired, to-wit: on January 12, 1959.

III.

On December 26, 1958, there was filed in the office of the Clerk of the United States District Court for the Western District of Washington a document denominated "Notice of Rejection of Trustee's Plan," but said document had no force and effect because (a), it was not signed by the Secretary of the Treasury, (b), the purported signature is over a notation of "Acting Secretary of the Treasury," but the signature itself is illegible, (c) Rule XI of the Rules of Civil Procedure provides that every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address; Rule 16 of the Local Rules of the United States District Court for the Western District of Washington provides that names shall be typed or printed under all signatures to pleadings.

IV.

The Director of Internal Revenue duly assessed taxes in the principal sum of $56,382.93, interest in the sum of $1,056.28 and penalties in the sum of $7,714.72, and

between the dates of December 8, 1953, and February 16, 1954, filed notice of claim of lien with the Auditor of King County, Washington, and demanded payment at about said dates, and no payments were made, except as hereinafter stated.

V.

On February 4, 1959, the Trustee herein paid to the United States the sum of $57,000.00 to conform with the Plan of Corporate Reorganization and said sum has been kept and retained by the said United States, but if it be relieved from the acceptance of said sum as in confirmation of said Plan, nevertheless the money would be applied upon the payment of the principal of the tax, so that, in any event, the principal of the tax is fully paid.

VI.

The Debtor made to the United States an offer in compromise and deposited with the United States, to be applied upon its taxes, the following amounts upon the following dates:

$36,000.00	—	June 7, 1954
1,000.00	—	February 8, 1955
1,000.00	—	March 14, 1955
1,000.00	—	April 13, 1955
1,000.00	—	August 19, 1955

and said money was kept and retained by the United States until the 17th day of January, 1958, when it was returned to the Trustee herein. The interest on the amount so deposited for the time withheld at 6% per annum is the sum of $3,863.81.

VII.

If it be finally determined that the amount certified by the United States District Judge of $57,000.00 was, in fact, fair and equitable and that it discharges all the taxes, interest and penalties, then there would be no necessity of computing the amount of anti-bankruptcy interest and post-bankruptcy interest, but, since that matter is still in dispute, no one has computed the exact amount of interest that would be owing up to September 30, 1955, the date of bankruptcy, but leaving that matter aside, the only portion of the claim of the United States that can be said to be in dispute and unpaid is its claim for:

1. Penalties.
2. Compound interest.
3. Post-Bankruptcy interest.

Dated at Seattle, in said District, February 9th, 1959.

/s/ VAN C. GRIFFIN,
Referee-Special Master.

From the foregoing Findings of Fact, the Referee-Special Master makes the following

Conclusions of Law

1. That the provisions of the Plan of Corporate Reorganization, which stated that the sum of $57,000.00 was a reasonable and just sum to be paid to the United States in discharge of its tax claim, have been fully complied with and said sum has been paid and the United States of America has no further claim against the Trustee, the funds in his hands or the Debtor corporation.

2. The claim of the United States for penalties is fully answered by Section 57(j), which prohibits the payment of penalties from bankruptcy estates, and there is no exception therein that penalties must be paid if a lien is claimed, and I can think of no reason why the ex-parte filing of a notice would change the basic rights of the parties.

3. My interpretation of the claim of the United States is that certain taxes became due at a date fixed before assessment and that it computes the interest on these taxes between that date and the date of assessment and includes the interest so computed in the assessment and that such computation results in charging interest on interest, or, compound interest.

"Compound interest or interest on interest is not favored in the law." 47 C. J., page 15

The following excerpts are from the case of Vanston Bondholders, etc. v. Green, 329 U. S. 156, 91 Law Edition, 163

"We agree with the conclusion of the Circuit Court of Appeals that the claim for interest on interest should not be permitted to share in the debtor's assets, but disagree with the reasons given for that conclusion." * * *

"For assuming, arguendo, that the obligation for interest on interest is valid under the law of New York, Kentucky, and the other states having some interest in the indenture transaction, we would still have to decide whether allowance of the claim would be compatible with the policy of the Bankruptcy Act." * * *

"But bankruptcy courts must administer and enforce the Bankruptcy Act as interpreted by this Court in accordance with authority granted by Congress to determine how and what claims shall be allowed under equi-

table principles. And we think an allowance of interest under the circumstances shown by this case would not be in accord with the equitable principles governing bankruptcy distributions."

"When and under what circumstances federal courts will allow interest on claims against debtors' estates being administered by them has long been decided by federal law. The general rule in bankruptcy and in equity receivership has been that interest on the debtors' obligations ceases to accrue at the beginning of proceedings. Exaction of interest, where the power of a debtor to pay even his contractual obligations is suspended by law, has been prohibited because it was considered in the nature of a penalty imposed because of delay in prompt payment—a delay necessitated by law if the courts are properly to preserve and protect the estate for the benefit of all interests involved. Thus this Court has said: "We cannot agree that a penalty in the name of interest should be inflicted upon the owners of the mortgage lien for resisting claims which we have disallowed. As a general rule, after property of an insolvent passes into the hands of a receiver or of an assignee in insolvency, interest is not allowed on the claims against the funds. The delay in distribution is the act of the law; it is a necessary incident to the settlement of the estate."

A judgment entered by a court of competent jurisdiction has a greater presumption of validity than has any ex-parte act of the Director of Internal Revenue and the Bankruptcy Court, being a court of equity and where equitable principles demand, may go behind the face of a judgment or an assessment.

See Pepper v. Linton, 308 U. S. 295, 84 Law Edition, 281.

4. It would be unconscionable and inequitable to allow the United States to charge the assets in the hands of the Trustee with interest on money for the time that said money was in the possession of the United States and during which time the Debtor and the Trustee were deprived of said money and the amount of the interest at 6% per annum on the sums held by the United States for the time so held amounts to $3,510.40 and therefore that sum should be deducted from any claim for taxes or interest which might ultimately be allowed to the United States.

The Referee-Special Master's conclusion that penalties and post-bankruptcy interest should not be paid from the assests of the estate is well supported by reasoning and authority in the case of G. N. Childress, etc. in the United States District Court for the Middle District of North Carolina, cited in the opinion of the Referee-Special Master herein.

As recently as January 8, 1959, in the case of In Re Magnus Harmonica, the United States Court of Appeals, Third Circuit, (Commerce Clearing House 59404) followed the principles announced in Vanston v. Green, 329 U. S., 156, which this Referee-Special Master undertakes to apply here, and in that case the Court said:

"II. Post-petition Interest

We deal here only with interest following the institution of the reorganization proceedings. We are cited to the rule that interest is not recoverable after such a proceeding has begun and to the exception that the rule does not apply when the creditor is secured above the amount of his principal debt.

As to the "interest on interest" claim, that part of it may be disposed of by saying that this is not interest provided for in the contract but is based upon Credit's own idea of handling the charges it made against its borrower. There is no contractual claim to it and the bankruptcy court judge was correct in denying it.

With regard to that part of the interest claim which is within the terms of the contract, we have a closer question. A bankruptcy court is one with equity powers and has a measure of discretion in their exercise. Vanston v. Green, 329 U. S. 156 (1946). In this particular case equitable considerations do not favor giving the claimed payment to this secured creditor. It made overcharges against the debtor outside the terms of the contract and it is only because the debtor is precluded from complaining that the trustee is bound by the debtor's inaction. Such equities as are apparent favor the trustee acting for the general creditors as against Credit. Both the referee and the district judge made an accurate application of equitable principles. Furthermore, this case is like Vanston v. Green, supra, in that the collection of the amount due Credit was deferred by the advent of reorganization and bankruptcy proceedings. This case then fits Vanston v. Green both on its facts and on its statement of equitable principles.

The judgment of the district court will be affirmed."

Dated at Seattle, in said District, February 9, 1959.

/s/ VAN C. GRIFFIN
Referee-Special Master.

[Endorsed]: Filed Feb. 9, 1959.

[Title of District Court and Cause.]

ORDER DETERMINING LIABILITY FOR TAXES OF THE UNITED STATES

The Trustee's Petition to determine proper allowances of claims to the United States for taxes and Objections thereto came duly on for hearing, the Trustee appearing in person and by his attorney, Donald A. Schmechel, and the United States appearing by Thomas R. Winter, Special Assistant to the Regional Counsel for the Internal Revenue Service, and Jacob A. Mikkelborg, Assistant United States District Attorney, and oral and documentary evidence was introduced, the matter was argued to the Court and the Court made and entered its Memorandum Decision herein, and now makes the following

Order

I.

On due proceedings had, the Plan of Corporate Reorganization herein provided for the payment to the United States of $57,000.00 in full for its tax claim, which was duly certified to the Secretary of the Treasury and he did not reject said Plan within ninety (90) days, as provided by law, and therefore he is conclusively presumed to have accepted it and said sum has been duly paid to the United States of America and the Trustee and the assets of the estate and the Debtor are fully discharged from any and all claims of the United States for taxes, penalties and interest.

Done in Open Court this 9th day of February, 1959.

/s/ VAN C. GRIFFIN,
Referee-Special Master.

[Endorsed]: Filed Feb. 9, 1959.

[Title of District Court and Cause.]

PETITION FOR REVIEW

To: Honorable Van C. Griffin, Referee-Special Master

The petition of the United States of America respectfully represents:

I.

Your petitioner, United States of America, is now and at all times herein mentioned was a sovereign and corporate body politic. The debtor is justly and truly indebted to the United States for taxes due under the Internal Revenue laws of the United States, as set forth in the verified claims of the United States filed on its behalf.

II.

On February 9, 1959, your Honor, as Referee-Special Master, entered an order herein, determining the liability for taxes of the United States, providing as follows:

"On due proceedings had, the Plan of Corporate Reorganization herein provided for the payment to the United States of $57,000.00 in full for its tax claim, which was duly certified by the Secretary of the Treasury and he did not reject said Plan within ninety (90) days, as provided by law, and therefore he is conclusively presumed to have accepted it and said sum has been duly paid to the United States of America and the Trustee and the assets of the estate and the Debtor are fully discharged from any and all claims of the United States for taxes, penalties and interest."

The said order was based on Findings of Fact and Conclusions of Law, finding and holding in substance:

1. That the Secretary of the Treasury did not properly file a notice of rejection of the plan of reorgan-

ization, as amended, with respect to the claims of the United States for taxes, as provided in Section 199 of the Bankruptcy Act;

2. That interest on the amounts deposited with the United States under an offer in compromise made prior to the reorganization proceedings by the debtor should be credited against the Government's claim for taxes;

3. That the United States is not entitled to post-bankruptcy proceeding interest on its tax claims which were liens on the debtor's property prior to said insolvency proceedings;

4. That the United States is not entitled to post-bankruptcy proceeding penalties on its tax claims which were liens on the debtor's property prior to the insolvency proceedings;

5. That the United States is not entitled to interest on the total assessments ten days after issuance of notice and demand, to and including September 30, 1955, the date the petition in the proceedings was filed.

III.

The United States of America respectfully assigns the following specifications of error in said Findings of Fact entered February 9, 1959, by the Honorable Referee-Special Master:

1. That the Referee erroneously determined that the evidence adduced by the hearing before said Referee was sufficient to support his finding that the order of the United States District Court of August 28, 1958, requiring notice of rejection or acceptance of the Trustee's proposed plan, as amended, was duly served upon the Secretary of the Treasury, or was sufficient to deter-

mine the date of said service effective to commence running of the 90-day period within which acceptance or rejection according to the terms of the said order must be filed; (Referee's Finding of Fact I)

2. That the Referee erroneously determined that the acceptance or rejection of the Trustee's plan of reorganization, as amended, was improperly filed with the Clerk of the United States District Court, Western District of Washington, and erroneously concluded that the notice of rejection should have been filed with the Referee-Special master, rather than with the Clerk of said United States District Court; (Referee's Finding of Fact II)

3. That the Referee erroneously determined that the notice of rejection was improper and of no effect by virtue of the fact that it was signed by the Acting Secretary of the Treasury without any showing or affirmation of his authority or capacity to so act, and without printing his name below his signature subscribed thereon, and that said irregularities, if any, were material matters of substance; (Referee's Finding of Fact III)

4. That the Referee erroneously determined that the notice of rejection was not effectively filed on December 26, 1958, within the 90 days specified by the order of the United States District Court Judge entered November 5, 1958, and Section 199 of the Bankruptcy Act, as amended; (Referee's Finding of Fact II)

5. That the Referee erroneously determined that the notice of rejection was improper and of no effect by virtue of the fact that the notice of rejection by the Acting Secretary of the Treasury did not bear the name of an attorney for said Acting Secretary and his post

office address, or the address of the Acting Secretary of the Treasury; (Referee's Finding of Fact III)

6. That the Referee erroneously determined that the said notice of rejection by the Acting Secretary of the Treasury failed to comply with Section 199 of the Bankruptcy Act, as amended; (Referee's Findings of Fact II and III)

7. That the Referee erroneously determined that the Trustee of the debtor corporation is entitled to credit on the basis of interest on the sum deposited by the debtor corporation, prior ot the Trustee's appointment, to secure an offer in compromise made by said corporation prior to institution of the bankruptcy proceedings in this cause, and that said Referee erroneously determined that interest accrued at six per cent in the sum of $3,863.81, or at any rate and amount; (Referee's Finding of Fact VI)

8. That the Referee erroneously determined that the conditional tender of the sum of $57,000.00 discharged all liability for taxes, interest, and penalties, thereby making unnecessary the determination of the correct tax liability, including penalties and interest on the assessments (designated by the Referee as compound interest), and post-bankruptcy proceeding interest on the said assessments until paid in full. (Referee's Finding of Fact VII)

IV.

The United States of America respectfully assigns the following specifications of error in said Conclusions of Law entered by the Honorable Referee-Special Master, together with Findings of Fact on February 9, 1959:

1. That the Referee erroneously concluded that the claim of the United States of America has been paid

by virtue of tender of the sum of $57,000.00, and that the United States of America has no further claim against the Trustee, the funds in his hands, or the debtor corporation; (Referee's Conclusion of Law 1.)

2. That the Referee erroneously concluded that Section 57(j) of the Bankruptcy Act, as amended, prohibits payment and collection of penalties from bankrupt estates after institution of bankruptcy proceedings where the tax claims, including penalties, are secured by liens perfected prior to filing of the petition under Chapter X proceedings, as in this cause; (Referee's Conclusion of Law 2.)

3. That the Referee erroneously concluded that interest is not allowable on the assessments duly made pursuant to the Internal Revenue laws of the United States, and erroneously concluded that authorities cited by said Referee are controlling of the issue as to interest in this cause; (Referee's Conclusion of Law 3.)

4. That the Referee erroneously concluded that the claim of the United States is diminished by reason of the deposit of a sum under an offer in compromise and interest on such sum deposited to secure said offer in compromise at any rate or amount based on such deposit; (Referee's Conclusion of Law 4.)

5. That the Referee erroneously concluded that interest accrued subsequent to commencement of insolvency proceedings should not be paid from the assets of the estate where the interest is based on assessments supported by liens perfected prior to commencement of said proceedings, as provided by Section 57(j) of the Bankruptcy Act or other provisions thereof. (Referee's Conclusion of Law 4.)

V.

The Referee-Special Master's Order Determining Liability for Taxes of the United States is erroneous in that:

1. It purports to order that the plan of reorganization was approved and accepted by the United States of America upon the purported failure of the Secretary of the Treasury to reject said plan within 90 days, as provided by law, and further purporting to order that the claims for taxes, penalities and interest have been paid by the subsequent tender of a certified check in the sum of $57,000.00;

2. It fails to allow the claims of the United States in the total sum of $65,336.79 plus interest thereon at the rate of six per cent per annum from the dates of notice and demands, as provided by law, and until paid, except as to the sum of $182.86, which tax liability was not assessed until February 8, 1956, and notice and demand not made until after insolvency proceedings, or until January 27, 1956;

3. It fails to find and conclude that Julian A. Baird, as Acting Secretary of the Treasury, did properly certify by virtue of and pursuant to the provisons of Section 199 of the Bankruptcy Act that he rejected said plan of reorganization, as amended, with respect to the claims of the United States for taxes within the time properly allowed by law, and that the said plan, as amended, providing for the full payment to the United States of its taxes in the sum of $57,000.00 is rejected and not binding upon the United States of America;

4. It fails to allow and order paid post-bankruptcy interest on the tax claims and prior liens of the United States of America;

5. It fails to allow and order paid penalties assessed which were liens on the debtor's property prior to the bankruptcy proceedings, as provided by law;

6. It fails to enter the findings, conclusions and order as requested by the United States of America, claimant.

Wherefore, your petitioner prays that the Referee-Special Master certify to the Judge of this Court and transmit to the Clerk the record in said proceedings, as provided in the Bankruptcy Act, as amended.

United States of America

/s/ CHARLES P. MORIARTY,
United States Attorney

/s/ JACOB A. MIKKELBORG,
Assistant United States Attorney,

/s/ THOMAS R. WINTER,
Special Assistant to the Regional Counsel Internal Revenue Service.

Office and Post Office Address:
1012 U. S. Court House
Seattle 4, Washington.

[Endorsed]: Filed Feb. 18, 1959.

[Title of District Court and Cause.]

NOTICE OF FILING OF REFEREE'S CERTIFICATE ON REVIEW

To: Donald A. Schmechel, Attorney for the Trustee
Thomas R. Winter, Special Assistant to the Regional Counsel Internal Revenue Service.

Notice Is Hereby Given, that the undersigned Referee in Bankruptcy has, on this day filed with the Clerk of the U. S. District Court his Certificate on Review in the above-entitled matter, a copy of which is hereto attached, and has transmitted therewith the papers as shown in said Certificate.

Dated at Seattle, in said District, this 9th day of April, 1959.

/s/ VAN C. GRIFFIN,
Referee in Bankruptcy.

[Endorsed]: Filed April 9, 1959.

[Title of District Court and Cause.]

ORDER ADOPTING AND MODIFYING IN PART THE ORDER DETERMINING LIABILITY FOR TAXES OF THE UNITED STATES ENTERED BY THE REFEREE-SPECIAL MASTER ON FEBRUARY 9, 1959.

This matter having come on duly for hearing before the undersigned judge of the above entitled court at 10:00 o'clock a.m. on August 10, 1959, and being continued thereafter from time to time for further hearings at 9:45 o'clock a.m. on September 25, 1959, at

2:00 o'clock p.m. on March 1, 1960, at 2:00 o'clock p.m. on March 21, 1960 and 9:30 o'clock a.m. on May 6, 1960, upon the petition for review of the United States of America filed on February 18, 1959, seeking a review of the Findings of Fact and Conclusions of Law and Order Determining Liability for Taxes of the United States entered and filed by the Honorable Van C. Griffin, Referee-Special Master, on February 9, 1959, Richard D. Harris, the Trustee in the above entitled proceeding, being represented by Donald A. Schmechel, his attorney, and the United States of America being represented by Jacob A. Mikkelborg, Assistant United States Attorney, and Thomas R. Winter, Special Assistant to the Regional Counsel, Internal Revenue Service, and the court having considered the records and files herein, including those transmitted with the Referee's Certificate on Review dated April 8, 1959, and the Memoranda of Authorities filed by said attorneys for the Trustee and the United States of America, and the court having heard the arguments of said attorneys for the Trustee and the United States of America, and being duly advised in the premises, it is hereby

Ordered

1. That the Findings of Fact and Conclusions of Law and the Order Determining Liability for Taxes for the United States entered and filed by the Honorable Van C. Griffin, Referee-Special Master, on February 9, 1959 are modified to allow the United States of America to recover interest on the principal of all taxes owed

by the Alaska Telephone Corporation, debtor, through September 30, 1955, the date of filing of the original petition under Chapter XI of the Bankruptcy Act in these proceedings, without any deduction therefrom for interest on the monies held by the United States of America, pursuant to an offer and compromise made by said debtor prior to September 30, 1955, and said Findings and Order are further modified to indicate that the United States of America be and it hereby is determined to have properly filed a rejection of the amended plan of reorganization within 90 days after receipt of notice pursuant to Section 199 of the Bankruptcy Act, as amended.

2. That said Findings of Fact and Conclusions of Law and said Order of the Referee-Special Master entered and filed on February 9, 1959 is in all other respects adopted and confirmed, and specifically adopted and confirmed with respect to their determination that the United States of America is not entiled to any interest upon its tax claims after September 30, 1955, and is not entitled to recover any penalties regardless of whether they arose before or after September 30, 1955.

3. That Richard D. Harris, Trustee, is authorized and directed to pay such additional amounts as may be due the United States of America over and above the $57,000.00 heretofore paid upon its tax claims, unless an appeal or appeals are taken from this order, the additional amounts to be resolved by the attorneys for the said Trustee and the United States of America, and in

the event they are unable to agree on said amounts, this matter is recommitted to said Referee-Special Master for a determining of the amounts which may be due pursuant to the terms of this Order.

Dated this 16th day of May, 1960.

/s/ WILLIAM J. LINDBERG,
District Judge

Presented by:

/s/ DONALD A. SCHMECHEL
Attorney for
Richard D. Harris, Trustee

Approved as to form and
Notice of Presentation Waived:

/s/ THOMAS R. WINTER
Special Assistant to the
Regional Counsel,
Internal Revnue Service.

[Endorsed]: Filed May 10, 1960.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Alaska Telephone Corporation, and

To: Wright, Innis, Simon & Todd, Donald A. Schmechel, Attorney for Trustee of the Debtor, Alaska Telephone Corporation.

Notice Is Hereby Given that the petitioner herein, United States of America, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the second enumerated ordering paragraph of the Final Order entered in the above-entitled action on the 10th day of May, 1960.

Dated this 6th day of June, 1960.

/s/ CHARLES P. MORIARTY,
United States Attorney.

/s/ JACOB A. MIKKELBORG,
Assistant United States Attorney,
Attorneys for United States of America.

[Endorsed]: Filed June 6, 1960.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING AND DOCKETING APPEAL

This Matter coming on regularly before the undersigned Judge of the above-entitled Court on motion of the United States Attorney for an order extending time for filing the record on the appeal noted on June 6, 1960, and docketing the said appeal, pursuant to the provisions made and provided by Federal Rules of Civil Procedure, Rule 73(g), and the Court having heard the statement of counsel for the United States and it appearing that sufficient cause has been shown for issuance of this order, now, therefore

It Is Hereby Ordered that the United States of America may have to and including September 4, 1960, which date is the ninetieth (90th) day from the date of filing the said Notice of Appeal.

Dated this 14th day of July, 1960.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Approved and Presented by:

/s/ JACOB A. MIKKELBORG,
Assistant United States Attorney.

Approved for Entry and
Notice of Presentation Waived:

/s/ DONALD A. SCHMECHEL,
Attorney for Richard D. Harris,
Trustee.

[Endorsed]: Filed July 14, 1960.

[Ttile of District Court and Cause.]

CERTIFICATE OF CLERK, UNITED STATES DISTRICT COURT, TO RECORD ON APPEAL.

United States of America, Western District of Washington—ss.

I, Harold W. Anderson, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision I of Rule 10 as Amended, of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, I am transmitting herewith all of the original papers in the file dealing with the proceeding as the record on appeal herein to the United States Court of Appeals at San Francisco, as designated by counsel, to-wit:

1. Notice of Filing Petition for Review.

2. Referee's Certificate on Review, filed April 9, 1959, including the following:

(a) Petition to Determine Proper Allowance of Claims of United States for Taxes and Objections Thereto. (Copies of proof of claim of the United States filed December 14, 1957, February 7, 1956 and January 17, 1956, labeled Exhibits "A", "B" and "C", respectively, and by reference incorporated therein.)

(b) Order Setting Hearing on Trustee's Petition to Determine Proper Allowance on Claims of United States of America.

(c) Affidavit of Donald A. Schmechel made January 26, 1959.

(d) The Amended Plan and the Judge's Orders thereon.

(e) Opinion of Referee-Special Master as to the tax claim of the United States of America.

(f) Findings of Fact and Conclusions of Law.

(g) Order Determining Liability for Taxes of the United States.

(h) Petition for Review.

3. Notice of Filing of Referee's Certificate, filed April 9, 1959.

4. Order Adopting and Modifying in Part the Order Determining Liability for Taxes of the United States entered by the Referee-Special Master on February 9, 1959.

5. Notice of Appeal filed June 6, 1960.

6. Order Extending Time for Filing and Docketing Appeal filed July 14, 1960.

7. Designation of Contents of Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 30th day of August, 1960.

HAROLD W. ANDERSON,
Clerk.

[Seal]

/s/ By JAMES M. BURKE,
Deputy.

[Endorsed]: No. 17066. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Richard D. Harris, Trustee for Alaska Telephone Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed and Docketed: August 31, 1960.

/s/ FRANK H. SCHMID,
Clerk of the United States Court of Appeals
for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit

No. 17066

UNITED STATES OF AMERICA, Appellant,

vs.

RICHARD D. HARRIS, Trustee, ALASKA TELEPHONE CORPORATION,

Debtor-Appellee.

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY ON APPEAL

1. The Court erred in adopting and confirming that part of the Order of the Referee-Special Master entered and filed on February 9, 1959, wherein the Referee concluded that Section 57(j) of the Bankruptcy Act, as amended, prohibits payment and collection of penalties from bankrupt estates after institution of bankruptcy proceedings where the tax claims, including penalties, are secured by liens perfected prior to filing of petition under Chapter X proceedings in this cause; (Referee's Conclusion of Law 2.)

2. That the Court erred in concluding that Section 57(j) of the Bankruptcy Act, as amended, prohibits payment and collection of penalties from bankrupt estates after institution of bankruptcy proceeding where the tax claims, including penalties, are secured by liens perfected prior to filing of the petition under Chapter X proceedings, as in this cause;

3. That the Court erred in failing to enter judgment allowing and ordering paid the tax claims of the United

States, including penalties which were secured by liens perfected prior to the filing of the petition under Chapter X in this cause.

/s/ CHARLES P. MORIARTY,
United States Attorney.

/s/ JACOB A. MIKKELBORG,
Assistant United States Attorney.

/s/ THOMAS R. WINTER,
Special Assistant to the Regional Counsel, Internal Revenue Service.

[Endorsed]: Received Sept. 9, 1960.

[fol. 63a]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 17066

UNITED STATES OF AMERICA, Appellant,

vs.

RICHARD D. HARRIS, Trustee for Alaska Telephone Corporation, Appellee.

[fol. 64] Before: Chambers, Hamley and Merrill, Circuit Judges.

MINUTE ENTRY OF ARGUMENT AND SUBMISSION —January 5, 1961

This cause coming on regularly for hearing and submission Mr. Karl Schmeidler, Attorney, Dept. of Justice, argued for the Appellant and Mr. Donald A. Schmechel, argued for the appellee, and thereupon, the court ordered this cause submitted for consideration and decision.

[fol. 65]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—February 1, 1961

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

[fol. 66] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 17,066

UNITED STATES OF AMERICA, Appellant,

vs.

RICHARD D. HARRIS, Trustee for Alaska Telephone Corporation, Appellee.

Upon Appeal From the United States District Court for the Western District of Washington Northern Division

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OPINION—February 1, 1961

Before: Chambers, Hamley and Merrill, Circuit Judges.

Per Curiam:

This appeal involves lien claims in the sum of $7,714.72, asserted by the United States against properties of the Alaska Telephone Corporation, a debtor in reorganization under Chapter X of the Bankruptcy Act. The claim is for penalties imposed on unpaid federal taxes and was disallowed by the Referee in Bankruptcy as in conflict with § 57(j) of the Bankruptcy Act, 11 U.S.C. § 93. Upon review, the ruling of the referee was affirmed by the District Court and the United States has taken this appeal.

The precise point involved was presented to this court in Simonson vs. Granquist, opinion handed down this day, with which case the instant case was consolidated for purposes of argument. For the reasons set forth in that opinion, we hold the rulings of the referee and the District Court to be error.

Reversed and remanded with instructions that the lien claim of the United States be allowed as a secured claim against the properties of the debtor corporation.

[fol. 67] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 17066

UNITED STATES OF AMERICA, Appellant,

vs.

RICHARD D. HARRIS, Trustee, etc., Appellee.

JUDGMENT—Filed and Entered February 1, 1961

Appeal from the United States District Court for the Western District of Washington, Northern Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington, Northern Division and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and remanded, with instructions that the lien claim of the United States be allowed as a secured claim against the properties of the debtor corporation.

[fol. 68]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MINUTE ENTRY OF ORDER DENYING PETITION FOR REHEARING —March 13, 1961

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of appellee, filed March 7, 1961 and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is, denied.

[fol. 69] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 70]

SUPREME COURT OF THE UNITED STATES

No. 919, October Term, 1960

HATTIEBELLE O. SIMONSON, Trustee in Bankruptcy, etc., et al., Petitioners,

vs.

R. C. GRANQUIST, District Director of Internal Revenue, et al.

ORDER ALLOWING CERTIORARI—June 5, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.